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No. 91-1600-CFX
Status: GRANTED

Title: Hazen Paper Company, et al., Petitioners
v.
Walter F. Biggins

Docketed:
April 3, 1992

Court: United States Court of Appeals for
the First Circuit

Counsel for petitioner: Harrington, John M.

Counsel for respondent: Egan, John J.

Entry	Date	Note	Proceedings and Orders
1	Apr 3 1992	G	Petition for writ of certiorari filed.
2	Apr 29 1992		Brief of respondent Walter F. Biggins in opposition filed.
4	May 1 1992	G	Motion of National Association of Manufacturers, et al. for leave to file a brief as amici curiae filed.
3	May 6 1992		DISTRIBUTED. May 22, 1992
5	May 13 1992		Opposition of respondent Biggins to motion of National Association of Manufacturers, et al. (TB REPRINT for leave to file a brief as amici curiae filed.
6	May 14 1992		DISTRIBUTED.
7	Jun 3 1992		REDISTRIBUTED. June 19, 1992
8	Jun 22 1992		Motion of National Association of Manufacturers, et al. for leave to file a brief as amici curiae GRANTED.
9	Jun 22 1992		Petition GRANTED. *****
10	Jul 28 1992		Record filed.
		*	Certified proceedings United States Court of Appeals, First Circuit and U.S. District Court, Massachusetts (BOX)
11	Jul 31 1992		Record filed.
		*	Original proceedings United States District Court, District of Massachusetts (1 BOX)
12	Aug 5 1992		Joint appendix filed.
13	Aug 5 1992		Brief of petitioners Hazen Paper Co., et al. filed.
14	Aug 6 1992		Brief amici curiae of Equal Employment Advisory Council, et al. filed.
15	Aug 6 1992		Brief amici curiae of United States, et al. filed.
16	Aug 21 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Sep 2 1992		Brief amicus curiae of National Employment Lawyers Assn. filed.
17	Sep 4 1992		Brief of respondent Walter E. Biggins filed.
19	Sep 8 1992		Brief amicus curiae of American Association of Retired Persons filed.
20	Sep 14 1992	D	Application (A92-220) to file a reply brief on the merits in excess of page limits, submitted to Justice Souter.
21	Sep 18 1992		Application (A92-220) denied by Justice Souter.
23	Sep 30 1992		Reply brief of petitioner filed.
22	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Nov 20 1992		SET FOR ARGUMENT WEDNESDAY, JANUARY 13, 1993. (2ND CASE).

2/98

Entry	Date	Note	Proceedings and Orders

25	Nov 23 1992		CIRCULATED.
26	Dec 21 1992	X	Supplemental brief of petitioner filed.
27	Dec 30 1992	D	Motion of respondent to strike supplemental brief filed.
28	Jan 4 1993	X	Supplemental brief of respondent filed.
29	Jan 11 1993		Motion of respondent to strike supplemental brief DENIED.
30	Jan 13 1993		ARGUED.

91-1600

No. -

Supreme Court, U.S.
FILED

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, *et al.*,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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QUESTIONS PRESENTED

1. Whether, in view of its consequence of imposing automatic punitive damages in every discriminatory treatment case where an underlying violation of the statute is found, and in light of the varied and inconsistent approaches of the circuits, the "knew or showed reckless disregard" standard for liquidated (double) damages liability announced by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), may properly be applied to claims for individual discriminatory treatment under the Age Discrimination in Employment Act?

2. Whether an employer's interference with an employee's pension vesting, in a plan where benefits vest after 10 years of service and are not based on age, violates the Age Discrimination in Employment Act?

LIST OF PARTIES

The parties to the proceedings below were petitioners Hazen Paper Company,¹ Robert Hazen and Thomas N. Hazen. The respondent before this Court is Walter F. Biggins.

¹ Hazen Paper Company is a private, closely held corporation organized under the laws of the Commonwealth of Massachusetts. The Company has no parent or subsidiary entities.

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In the
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No. -

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, *et al.*,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Petitioners Hazen Paper Company, Robert Hazen and Thomas N. Hazen respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on January 8, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Bownes, S.J.) is reported at 953 F.2d 1405 (1st Cir. 1992), and is reprinted in the Appendix hereto, p. A-5, *infra*.

The Memorandum and Order of the United States District Court for the District of Massachusetts (Freedman, C.J.) has not been reported. It is reprinted in the Appendix hereto, p. A-50, *infra*.

JURISDICTION

Invoking federal jurisdiction pursuant to 28 U.S.C. §1331, the respondent brought this action in the United States District Court for the District of Massachusetts. After a five-day trial, the jury found the defendants liable for age discrimination under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.* The jury further found defendants' violation of the statute to have been "willful", thereby authorizing the assessment of liquidated (double) damages in accordance with the provisions of Section 7(b) of the ADEA, 29 U.S.C. §626(b). Judgment was entered for plaintiff in the District Court on August 27, 1990.

On April 5, 1991, the District Court allowed in part and denied in part the defendants' motion for judgment n.o.v. The court denied the motion with respect to the finding of predicate liability under the ADEA, but allowed the motion with respect to liquidated damages after ruling the evidence insufficient to sustain the jury's finding of "willfulness". Both respondent and petitioners thereupon appealed to the United States Court of Appeals for the First Circuit.

In January, 1992, the First Circuit affirmed in part and reversed in part the judgment of the District Court. *See App. pp. A-3-4, infra*. Both parties sought reconsideration through timely petitions for rehearing and suggestions for rehearing in

banc; and on January 29, 1992, the Court of Appeals denied each of these cross-petitions. (*See App. pp. A-1-2, infra.*)

The jurisdiction of this Court to review the judgment of the First Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, provides in material part as follows:

§623. Prohibition of age discrimination

(a) *Employer Practices.* It shall be unlawful for an employer — 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

§626. Recordkeeping, investigation, and enforcement

(b) *Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.*

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter.

STATEMENT OF THE CASE

This case arises out of the termination of plaintiff Walter F. Biggins' employment with Hazen Paper Company ("Hazen Paper" or the "Company") in June, 1986. Plaintiff was discharged from his position as Technical Director of Hazen Paper, a small family-owned business located in Holyoke, Massachusetts, following his refusal to sign a confidentiality agreement required of him as a condition of continuing employment at the Company. The uncontradicted evidence at trial established that Hazen Paper demanded that plaintiff sign the confidentiality agreement following its owners' discovery that Biggins had — contrary to prior assurances he had given them — been marketing consulting services of the type he performed for Hazen Paper to competitors of the Company. Plaintiff refused to sign the confidentiality agreement unless he received a guarantee of additional compensation in the form of increased salary and/or Company stock, and his employment was accordingly terminated. At the time of his discharge, plaintiff was 62 years of age, and several months shy of vesting in the Hazen Paper pension.

At trial, plaintiff argued that the Hazens' articulated reasons for discharging him from employment were pretextual, and that their true motivation was to prevent his imminent vesting in the Company pension. The jury returned a verdict in favor of plaintiff, and awarded him \$560,775.00 in compensatory damages under the ADEA. The jury also found the Hazens' purported violation of the statute to have been "willful". Accordingly, the District Court assessed an additional \$560,775.00 in liquidated damages against the Company pursuant to Section 7(b) of the ADEA, 29 U.S.C. §626(b).²

² The jury additionally awarded plaintiff \$100,000.00 for interference with his pension vesting in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, and \$315,100.00 for certain state law torts.

On defendants' post-trial motion for judgment n.o.v., the District Court upheld the jury's finding of age discrimination liability against the Company under the ADEA, ruling that "the jury could reasonably have found that defendants knew of plaintiff's [soon-to-be-vested] status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights." (See App. p. A-56, *infra*.) However, after acknowledging that plaintiff's proof of age discrimination was "a bit thin", the District Court held the evidence inadequate to sustain the jury's additional finding of willfulness, and struck the award of liquidated (double) damages previously assessed against Hazen Paper. (See App. pp. A-56, A-57-62, *infra*.)

On appeal, the First Circuit affirmed the judgment with respect to underlying ADEA liability, but reversed the lower court's entry of judgment n.o.v. against the jury's willfulness finding, and reinstated approximately \$420,000.00 in liquidated damages.³ Relying principally upon what it found to be a supportable inference that the defendants' real reason for terminating Biggins' employment at Hazen Paper was to interfere with his pension vesting, the Court of Appeals held that a claim of unlawful age discrimination had been made out. In the penultimate paragraph of its discussion of plaintiff's ADEA claim — the only section of the opinion addressed to how the evidence permitted a rational finding of age discrimination — the Court of Appeals reasoned that:

"[T]he jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pen-

³ The Court of Appeals had remitted plaintiff's predicate ADEA damages by roughly \$120,000.00, which remittitur in turn operated to reduce the liquidated damages award by an equivalent amount. See App. pp. A-22-23, *infra*.

sion rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years."

See App. p. A-14, *infra*.⁴

In reinstating the jury's award of liquidated damages, the First Circuit reversed the District Court's ruling that evidence of age discrimination which was "thin", "sparse", and in large part "circumstantial" and "self-serving" (see App. pp. A-56, A-59-62, *infra*) was insufficient as a matter of law to meet the higher threshold of a "willful" violation of the ADEA. Notwithstanding its acknowledgment that several other circuit courts have articulated heightened standards for willfulness liability comparable to the one applied by the District Court below, the First Circuit adopted a contrary test for liquidated damages which improperly authorizes such damages in virtually every case where disparate treatment is found under the ADEA.⁵ In so ruling, the Court of Appeals has at once disregarded the statute's legislative history, misconstrued its interpretation by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111

⁴ Likewise relying upon the forfeiture of pension benefits occasioned by the timing of plaintiff's discharge, the First Circuit held that the evidence permitted a finding that the defendants terminated Biggins' employment with the "specific intent" of interfering with his pension vesting, in violation of Section 510 of ERISA, 29 U.S.C. § 1140. In its brief discussion of plaintiff's ERISA claim, the Court of Appeals reasoned as follows:

"Plaintiff was discharged within weeks before the vesting of his pension. Although plaintiff was fired ostensibly because he refused to sign a confidentiality agreement, the jury could have found that the real reason was to deprive him of his pension benefits. The jury was entitled to draw reasonable inferences from the proximity of the date of firing and the date of vesting of plaintiff's pension."

See App. pp. A-23-24, *infra*. Although the Petitioners have consistently maintained that the jury's verdict under ERISA is unsupportable as a matter of law, the issue does not appear to warrant Supreme Court review at this juncture.

⁵ The decision of the First Circuit upholds the jury's willfulness finding by placing principal emphasis on Thomas Hazen's testimony that "he was 'absolutely' aware that age discrimination was illegal," and by concluding that such an acknowledgment "is as strong evidence of a knowing violation of ADEA as a plaintiff could wish." (See App. p. A-20, *infra*.)

(1985), and thrust the First Circuit into conflict with the strong consensus of federal circuit courts holding that the two-tier liability scheme envisioned by Congress in enacting the ADEA requires proof beyond that necessary to establish predicate age discrimination to warrant a finding of willfulness.

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari calls the Court's attention to two important issues of federal age discrimination law, raised by the decision of the Court of Appeals below, about which the circuits are deeply divided. The first issue concerns the standard for liquidated damages in discriminatory treatment cases under Section 7(b) of the ADEA. After recognizing that its sister courts of appeal had split into several camps on the question, the First Circuit adopted a test for "willful" violations of the statute which — by applying the literal definition of the term fashioned in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) — threatens employers with double damages in each and every case where an underlying ADEA claim is made out. In this regard, the First Circuit's articulated standard for "willfulness" liability disserves the punitive purpose of liquidated damages, as expounded by the Supreme Court in *Thurston*, and conflicts sharply with the standards embraced by the majority of other circuit courts that have addressed this issue.

The second issue raised herein concerns whether an age-neutral factor such as workplace seniority or pension status may properly serve as a proxy for "age" when applying the provisions of the ADEA. In upholding predicate ADEA liability against the Hazens, the First Circuit erroneously rested an inference of discrimination on a purported desire to interfere with the vesting of plaintiff's pension, a pension that was based on achieving 10 years of service and not in any way on age. In so doing, the First Circuit diverged from the ADEA's manifest legislative intent, stretched the statute's coverage inappropriately to reach conduct already prohibited by controlling law, and joined the

wrong side of a conflict among federal courts over whether or not considerations that are coincidentally but not causally connected to age may serve as the evidentiary basis from which age discrimination is inferred.

I. THE COURT OF APPEALS' CONSTRUCTION OF THE LIABILITY AND LIQUIDATED DAMAGES PROVISIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

A. *The First Circuit's Decision On The Standard For "Willfulness" Liability Under The ADEA Disserves The Congressional Intent Of Liquidated Damages, And Conflicts Sharply With The Standards Enunciated By The Majority Of Other Circuit Courts That Have Addressed This Issue.*

The Court of Appeals' decision reinstating liquidated damages against the defendants pursuant to Section 7(b) of the ADEA, 29 U.S.C. §626(b), announces a standard for "willfulness" liability that ignores Congress's intent in enacting this punitive provision of the statute. At the same time, the decision conflicts with the majority of federal courts which have addressed the issue, and destines employers to incur liquidated (double) damages liability in literally *every* discriminatory treatment case in which a jury finds a predicate violation of the ADEA.

The willfulness requirement for liquidated damages embodied in Section 7(b) of the ADEA is not defined by the statute. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), however, the Supreme Court articulated a standard for "willful" violations that would justify the assessment of double damages thereunder. After reviewing the structure and legislative history of the statute, and finding therein that Congress enacted Section 7(b) to create a second tier of ADEA liability

that would be *punitive* in nature and thus reserved for more flagrant violations of the law, the Supreme Court held that a "willful" violation is made out only upon a showing that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 128-29.⁶

In reaching this result, the Court rejected the prior decisions of some circuits that a willful violation exists whenever an employer has committed age discrimination, despite the employer's awareness of the ADEA and its potential applicability to the employment decision under review. The Court concluded that because the ADEA requires employers to post notices informing employees of their rights under the Act, *see* 29 U.S.C. §627, so broad a construction of willfulness liability would lead to "an award of double damages in almost every case" — a result at obvious variance with Congress's intent to create a two-tiered liability scheme. *See Thurston*, 469 U.S. at 128.⁷

Since *Thurston*, which, like the typical disparate impact case, involved a company-wide plan or policy that adversely affected an older segment of the employer's work force, federal courts have struggled to apply the "knew or showed reckless disregard" standard for willfulness liability to the claims of individual discriminatory treatment which dominate ADEA liti-

⁶ This Court has since reaffirmed the *Thurston* definition of willfulness in a case decided under the Fair Labor Standards Act, 29 U.S.C. § 216, the statute whose remedial provisions served as the model for ADEA Section 7(b). *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("The standard of willfulness that was adopted in *Thurston* — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act.").

⁷ As noted *supra*, the First Circuit upheld willfulness liability in this case on the basis of one defendant's acknowledgment that he knew age discrimination to be illegal. It is thus plain that the Court of Appeals' reasoning, while claiming to adhere to the language of *Thurston*, in fact gives life to the 'awareness of the ADEA in the picture' standard which the *Thurston* Court expressly rejected.

gation.⁸ The difficulty arises because, in discriminatory treatment cases, a finding of predicate discrimination liability necessarily requires a finding of discriminatory intent. Accordingly, and as the District Court recognized, *see* App. pp. A-57-59, *infra*, a mechanical application of *Thurston* to discriminatory treatment (in distinction to disparate impact) claims will inexorably lead to double damages in *every* case, a result contrary to the clear Congressional intent explicated by the Supreme Court in *Thurston*. *See Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1163 (6th Cir. 1991) ("The courts have had some difficulty in finding a definition of 'willfulness' that allows for the award of double damages where appropriate, but does not result in double damages being awarded as a matter of course whenever an employee is discharged or otherwise discriminated against because of his age. It is clear that Congress did not intend that double damages be awarded automatically whenever a violation of the ADEA occurs."); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987) ("We find the knowing or reckless disregard standard difficult to reconcile with the admonition to avoid imposing liquidated damages in every case, at least in the context of disparate treatment cases.").

Recognizing this problem, seven federal circuits have, when applying *Thurston* to discriminatory treatment cases such as the present one, required a greater evidentiary showing to surmount the willfulness threshold than that sufficient to permit an ordinary inference of age discrimination. Thus, the Third Circuit requires ADEA plaintiffs to establish "some additional

⁸ Judge Posner recently described such ADEA claims as "a major source of federal litigation and a growing factor in American labor markets." *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 656 (7th Cir. 1991). This perhaps understates the matter. Between 1970 and 1989, the employment discrimination caseload of the federal courts increased by 2,166%, as compared with a 125% growth rate in federal civil cases generally. Cases brought under the ADEA represented the single largest statutory source of this extraordinary growth. *See Donahue and Siegelman, "The Changing Nature of Employment Discrimination Litigation,"* 43 *Stan. L. Rev.* 983, 985, 989 (1991).

evidence of outrageous conduct" to warrant the imposition of liquidated damages. *See Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Similarly, the Fifth Circuit requires evidence of "egregious" actions beyond ordinary age discrimination to permit the assessment of liquidated damages. *See Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989).

In contrast to the "outrageous" and "egregious" tests for distinguishing ordinary violations of the ADEA from "willful" ones, the Sixth and Tenth Circuits have held that a plaintiff may recover liquidated damages only if he proves that age was the "predominant factor" in the employer's discharge decision. *See Schrand v. Pacific Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).⁹

Finally, the Fourth, Seventh and Eighth Circuits — while eschewing precise verbal formulations or tests — have all held that a plaintiff must introduce a greater quantum of evidence

⁹ The First Circuit misreads these cases when it states in its opinion that "[i]n this circuit, the 'determining factor' ingredient added by the Sixth and Tenth Circuits to the *Thurston* standard for proof of a 'willful' violation of ADEA in disparate treatment cases is already a basic requirement for proof of the underlying ADEA violation itself." *See* App. p. A-20, *infra*. This assertion is wrong in each of two significant respects. First, the requirement that unlawful consideration of age be a "determining factor" to permit predicate ADEA liability is not a requirement unique to the First Circuit, but is rather a basic element of "but for" causation applied in all discrimination cases. *See Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). More importantly, the willfulness standard adopted by the Sixth and Tenth Circuits is *not* a restatement of the statute's "determining factor" test. To the contrary, these courts hold that, not only must age be a consideration that makes a difference in the employer's decision (i.e., a "determinative" factor); it must further be *the predominant* factor in the decision. *See, e.g., Cooper*, 836 F.2d at 1551 (distinguishing "determining" factor from "predominant" factor: "Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct; for a willful violation to exist in a disparate treatment claim, a factfinder must find that age was the *predominant* factor in the employer's decision") (emphasis original).

than that sufficient to permit underlying ADEA liability if he is to meet the higher standard of proof required for willfulness. See *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991) (to prove willfulness, a plaintiff "must provide evidence beyond that which would prove an ordinary claim of age discrimination"); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (construing "willfulness" to require "direct evidence — more than just an inference from, say, an arguably pretextual justification — of age-based animus"); *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390-91 (4th Cir. 1987) (stating that evidence of age discrimination that is "too thin" will not sustain liquidated damages). See also *EEOC v. District of Columbia, Dep't of Human Services*, 729 F. Supp. 907, 917 (D.D.C. 1990), *vacated without op.*, 925 F.2d 488 (D.C. Cir. 1991) ("some evidence in excess of that necessary to establish a violation [of the ADEA] is needed to support a finding of willfulness").

Although the seven circuits and one district court¹⁰ cited above are thus clearly in conflict over the particular legal standard to apply to individual claims of "willful" discrimination under the ADEA, each attempts to fulfill the statute's legislative intent — as recognized by this Court in *Thurston* — of having a two-tier scheme of liability that will not result in the assessment of liquidated damages in every case. By contrast, the decision of the First Circuit to apply "without modification or qualification" the "knew or showed reckless disregard" standard of *Thurston* to individual discriminatory treatment cases, see App. p. A-20, *infra*, effectively dismantles the second tier of punitive liability envisioned by the statute. In thus aligning

¹⁰ The United States Court of Appeals for the District of Columbia Circuit is the only federal circuit which has not yet addressed the issue of liquidated damages in an ADEA case.

itself with the minority view of just three circuit courts,¹¹ the First Circuit has virtually guaranteed the imposition of onerous liquidated damages in every case where discriminatory treatment on the basis of age is found. This result at once runs counter to Congress's plain intent in enacting Section 7(b) of the ADEA, to the explicit admonitions of this Court in *Thurston*, and to the better reasoned views of seven other circuits that have addressed the issue.

The Court of Appeals below forthrightly conceded that, in contrast to the heightened standards for willfulness liability applied by other circuits, its rule of liquidated damages "in many cases ... will result in a willful violation following hard on the heels of an ADEA violation." (See App. p. A-20, *infra*.) The First Circuit thought itself bound to this manifestly inappropriate result, however, observing that "that is the nature of the beast in a disparate treatment case, at least until either Congress or the Supreme Court changes the definition of willfulness." (See App. p. A-20, *infra*.)

Given the dissonant approaches to the question of willfulness liability which federal courts have exhibited since the *Thurston* decision was handed down seven years ago, the time has come

¹¹ See *American Ass'n of Retired Persons v. Farmers Group*, 943 F.2d 996, 1005 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 937 (1992); *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 631-32 (11th Cir. 1990); *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989). It is significant to note, however, that although each of these courts purports to adhere strictly to the language of *Thurston* when evaluating claims for liquidated damages, the Second and Eleventh Circuits do so while acknowledging the need to distinguish ordinary from willful ADEA violations in the governing standard. See *Benjamin*, 873 F.2d at 44 (2d Cir. 1989) (applying *Thurston*'s "knew or showed reckless disregard" standard, but observing "that 'willfulness' is most easily understood when the term is analyzed along a continuum", and attempting to define certain classes of predicate ADEA violations that will not permit the award of liquidated damages); *Formby*, 904 F.2d at 631 (11th Cir. 1990) (applying *Thurston*, but noting that "[t]o ensure that a separation exists between [ordinary and willful] liability, we have recognized that a showing that an employer engaged in intentional age discrimination does not automatically entitle a plaintiff to receive liquidated damages").

for this Court to answer the invitation of the First Circuit and set the law of liquidated damages under the ADEA on its proper course. The importance of the ADEA's punitive damages remedy cannot be gainsaid, and the fractured split among the circuits over when such damages may be recovered in a disparate treatment case is now ripe for resolution. The Supreme Court should grant this Petition to reconcile a serious circuit conflict, and to provide needed coherence to an unsettled and vitally important area of federal age discrimination law.

B. *The First Circuit's Decision Erroneously Upholds ADEA Liability On The Basis Of An Employer's Purported Interference With An Employee's Pension Vesting, A Status Coincident With But Not Causally Related To Age.*

The inappropriateness of the First Circuit's sweeping willfulness standard is most starkly revealed in a case where the court relies on an impermissible inference to establish underlying ADEA liability. This is such a case.

The linchpin of the Court of Appeals' analysis in upholding age discrimination liability is its assertion that the jury could properly have concluded the Hazens were motivated by a desire to defeat plaintiff's pension vesting — and that the imposition of a confidentiality agreement was simply a pretextual means to that end. The First Circuit reasoned that "age was inextricably intertwined with the decision to fire Biggins," because "[i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." See App. p. A-14, *infra*. This reasoning, however, creates a *per se* rule equating pension status with age that is fundamentally flawed in its logic. Such a rule rests upon an assumed connection between age and pension eligibility which does not necessarily (and in this case does not in fact) exist.

The undisputed evidence at trial was that employees at Hazen Paper vest in the Company's pension plan after 10 full

years of service. Thus, an employee hired at age 19 vests at age 29, an employee hired at age 29 vests at age 39, and so on. Only the pure *happenstance* of plaintiff's being hired at age 52 — ironically a fact tending to *negate* an inference of age discrimination¹² — resulted in his pension vesting at the more advanced age of 62. In these circumstances, it was manifest error for the Court of Appeals to equate a discharge motivated by a desire to thwart pension vesting with age discrimination; for the two have absolutely nothing to do with one another.¹³

The First Circuit's ruling stands in conflict with a recent opinion of the Seventh Circuit, where the court held that a discharge premised upon the employee's eligibility for service-related pension benefits (as distinct from benefits determined on the basis of age) did not violate the ADEA. See *Wheeldon v. Monon Corp.*, 946 F.2d 533 (7th Cir. 1991). In *Wheeldon*, the Seventh Circuit held that in order to prevail on a claim that an employer's consideration of economic factors violated the ADEA, "the plaintiff must show that the economic factor relied upon by the employer operates as a proxy for age. Although pensions may be used as a proxy for age, we decline to rule that pension considerations always operate as such. Instead, the use of pensions as a proxy for age should be examined on a case-by-

¹² See *Menard v. First Security Services Corp.*, 848 F.2d 281, 289 n.4 (1st Cir. 1988) ("We note that [plaintiff] when hired was already age 52, making it seem less likely that his discharge three years later was based on company prejudice against older people").

¹³ It is, of course, well settled that an employee discharge motivated by considerations other than age — even improper ones — cannot violate the ADEA. See, e.g., *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 658-59 (7th Cir. 1991) ([Plaintiff's] age, the fact that he incurred a loss of pension benefits when he was fired, the fact that he was replaced by a much younger man, the fact that he may have been fired for an unethical reason unrelated to his age — none of these facts is evidence of age discrimination"); *Villanueva v. Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991) ("Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact") (affirming summary judgment).

case basis." *Wheeldon*, 946 F.2d at 536 (footnote omitted) (rejecting correlation between pension status and age, and affirming summary judgment against ADEA claim).

The error of the First Circuit's reasoning in substituting pension interference as a proxy for age bias under the ADEA (and the wisdom of the Seventh Circuit's more discerning approach) has been further demonstrated by two recent federal court decisions. In *Pickering v. USX Corp.*, 758 F. Supp. 1460 (D. Utah 1990), the court convincingly rejected the precise theory of age discrimination upon which the First Circuit premised liability against the Hazens:

"Plaintiff's protestations that age and pension eligibility are 'inexorably linked' are belied by the actual terms of the pension plan in this case. As is true of most pension plans, years of service — rather than age — is the primary factor in determining benefits eligibility. Absent some specific evidence of disparate treatment on the basis of age, the mere fact that older employees may have had more years of service than younger employees does not automatically convert the alleged pension benefits discrimination into age discrimination. A contrary holding would mean that virtually every discriminatory pension benefits denial in violation of ERISA section 510 would also constitute age discrimination. This court refuses to interpret the ADEA as a protection-broadening appendage to ERISA section 510. See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 109 S. Ct. 2854, 2867, 106 L. Ed.2d 134 (1989) (reasoning that the ADEA is not intended as an ERISA surrogate for protecting pension benefit rights)."

Pickering, 758 F. Supp. at 1462 (citation omitted). Accord *Harvey v. I.T.W., Inc.*, 672 F. Supp. 973, 975 (W.D. Ky. 1987) ("Even assuming *arguendo* the defendants terminated [plaintiff] to prevent his pension rights from fully vesting, this would not be probative of age discrimination since it goes to tenure

with the company, not age. A young person who has been with the company for a long time may very well be closer to a fully vested pension than an older person who just started work there recently." *But see White v. Westinghouse Elec. Co.*, 862 F.2d 56, 62 (3d Cir. 1988) (discharge of employee motivated by desire to avoid increased benefits payable after 30 years' service violated the ADEA, because "such amounts are inextricably linked to an employee's years of service to the company and, hence, to his age").

In predicating ADEA liability on the Hazens' purported denial of non age-related pension benefits to plaintiff, the First Circuit has plainly disregarded the intent of Congress. The ADEA's language, legislative history and overall structure make clear that Congress meant the statute to reach employment decisions based on age bias and prejudice, *not* to prohibit broader categories of personnel decisionmaking which involve age surrogates such as seniority or pension status.

The ADEA's overriding concern with age, *simpliciter*, is apparent in the statute's preamble, which provides that the purpose of the Act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." See ADEA Preamble, 29 U.S.C. §621(b). Age-focus is likewise evident in the ADEA's principal liability provision, which prohibits employment discrimination against any individual "*because of such individual's age.*" See 29 U.S.C. §623(1) (emphasis supplied).

Nowhere do the terms of the ADEA evince any indication that the proscriptions of the statute were meant to extend beyond an employer's age-driven decisionmaking to reach personnel actions based on pension status or length of service; and, indeed, certain provisions of the Act and its legislative history belie such an intent. With respect to its regulation of pension plans, the ADEA provides that "in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the

reduction of the rate of an employee's benefit accrual, because of age" shall be unlawful. See 29 U.S.C. §623(j)(1)(A).¹⁴ In an attempt to foreclose the very type of logical error committed by the First Circuit, however, the ADEA further provides that the prohibition against age-based benefits distinctions does *not*

"prohibit an employer . . . from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or participation which are taken into account for purposes of determining benefit accrual under the plan."

See 29 U.S.C. §623(j)(2). The First Circuit's stated rationale for sustaining ADEA liability in this case, *viz.*, that an intent to interfere with pension rights which vest on the basis of years of service is tantamount to age discrimination, is thus clearly incompatible with the Congressional intent to exempt seniority-based benefits decisions from the statute's coverage.¹⁵

¹⁴ It is entirely clear that the ADEA does not in terms prohibit the denial of pension benefits for reasons *unrelated* to age. Such a proscription is contained in Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, which specifically prohibits employers from discharging employees for the purpose of interfering with their attainment of pension rights. See, e.g., *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988).

¹⁵ See also *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) ("[S]eniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. This is borne out, to be sure, by the simple observation that a 35-year old employee might have more seniority than a 55-year old employee"). Accord, *Gray v. York Newspapers, Inc.*, ___ F.2d ___, 1992 WL 26521, at *17 (3d Cir. 1992); *EEOC v. Clay Printing Co.*, ___ F.2d ___, 1992 WL 17275, at *6-8 (4th Cir. 1992) (same). See also *Finnegan v. Trans World Airlines, Inc.*, 767 F. Supp. 867 (N.D. Ill. 1991) (employer's cap on annual vacation accrual rate based on years of service provided no basis for ADEA liability, even though the limitation correlated with age).

That Congress did not intend the ADEA to be stretched to govern employer conduct designed to interfere with non age-related pension vesting is further revealed in ERISA's explicit remedies for such prohibited conduct. See ERISA §510, 29 U.S.C. §1140 (making it unlawful to discharge any person from employment "for the purpose of interfering with the attainment of any right to which such [person] may become entitled under [an employee pension plan]"). This Court has indicated its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA," *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), and has likewise suggested that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981). Here, Congress has in ERISA enacted a comprehensive remedial scheme intended to penalize employer attempts to frustrate employee benefit rights. There is thus no reason in law or logic for courts to engraft onto the ADEA a regulatory provision already spelled out in detail by ERISA — particularly in cases where, as here, the ERISA remedy was successfully invoked and obtained by the plaintiff.¹⁶

As a final point, the Petitioners note that the First Circuit's decision to allow non age-related pension status to serve as a stand-in for the ADEA's prohibition against discrimination "because of [an] individual's age" joins a closely related conflict among the circuits. Federal courts have struggled with the question of whether factors that are coincident with but not causally related to age constitute discriminatory considerations

¹⁶ This conclusion finds further support in the remarks of the ADEA's primary legislative sponsor, who observed that "the age discrimination law should not be used as the place to fight the pension battle." See *Age Discrimination In Employment Act: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (testimony of Senator Jacob Javits).

for purposes of ADEA liability. As noted *supra* at pp. 15-17, courts have reached divergent conclusions with respect to pension status based on years of service, the purported age proxy relied upon by the First Circuit in this case. A kindred question over which the circuits are likewise divided concerns whether an employer who discharges an employee because of his or her high salary — a factor related to workplace seniority rather than to age *per se* — has violated the ADEA. *Compare Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 117 (2d Cir. 1991) (holding that, while “high salary and age may be related,” an individual discharge decision premised solely on an employee’s seniority-based salary or other financial considerations does not violate the ADEA), *with Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1207 (7th Cir. 1987) (holding that, “because of the high correlation between age and salary, it would undermine the goals of the ADEA to recognize cost-cutting as a nondiscriminatory reason for an employment decision”). No consensus has yet developed among federal courts on the troublesome question of age proxies; yet the issue is destined to arise again and again in ADEA litigation, as employers inevitably make personnel decisions based on economic considerations that may operate to disadvantage older workers in particular cases.

In sum, the decision of the First Circuit sustaining age discrimination liability against the Hazens on the basis of their purported interference with plaintiff’s (non age-related) pension benefits contravenes the logic, language and legislative intent of the ADEA. At the same time, the Court of Appeals’ decision improperly broadens the statute to reach employer conduct already regulated under Section 510 of ERISA, and extends a conflict in the federal courts over whether age-neutral considerations such as pension status or wage rate can serve as proxies for “age” when applying the liability provisions of the ADEA. The Supreme Court should act now to resolve this important and unresolved issue of federal discrimination law.

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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**United States Court of Appeals
For the First Circuit**

No. 91-1591

**WALTER F. BIGGINS,
PLAINTIFF, APPELLEE,**

v.

**THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.**

No. 91-1614

**WALTER F. BIGGINS,
PLAINTIFF, APPELLANT,**

v.

**THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLEES.**

**Before
BREYER, *Chief Judge*,
BOWNES, *Senior Circuit Judge*,
TORRUELLA, SELYA and CYR, *Circuit Judges*,
and TAURO,* *District Judge*.**

*Of the District of Massachusetts, sitting by designation.

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ORDER OF-COURT

Entered: January 29, 1992

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing submitted by defendants appellants/cross appellees and plaintiff appellee/cross appellant, and their suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that these appeals be heard or reheard by the court en banc,

It is ordered that both petitions for rehearing and both suggestions for rehearing en banc be denied.

By the Court:

Clerk

[cc: Messrs. Harrington and Egan)

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United States Court of Appeals
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No. 91-1614

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THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: January 8, 1992

These causes came on to be heard on appeal from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part and reversed in part and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date.

No costs to either party.

By the Court:

Clerk

(cc: Messrs. Harrington and Egan]

United States Court of Appeals For the First Circuit

No. 91-1591

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WALTER F. BIGGINS

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THE HAZEN PAPER COMPANY, ET AL.,

DEFENDANTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

(HON. FRANK H. FREEDMAN, U.S. District Judge)

Before

TORRUELLA, Circuit Judge,

BOWNES, Senior Circuit Judge,

and TAURO,* District Judge.

John M. Harrington, Jr. with whom *Robert B. Gordon*, *Ropes & Gray*, *Richard S. Hayes*, *Patrick W. McGinley*, *Raymond R. Randall* and *Sullivan & Hayes* were on brief for Hazen Paper Company, et al.

John J. Egan with whom *Maurice M. Cahillane* and *Egan, Flanagan and Cohen, P.C.* were on brief for Walter F. Biggins.

* Of the District of Massachusetts, sitting by designation.

January 8, 1992

BOWNES, *Senior Circuit Judge*. After his employment was terminated at the Hazen Paper Company in June of 1986, Walter F. Biggins sued the company and the two individuals who owned and operated it, Robert Hazen and Thomas N. Hazen. In the district court Biggins obtained an amended judgment against the defendants in the amount of \$1.78 million dollars. Both the defendants and the plaintiff appeal this judgment.

I. BACKGROUND

A. *The Jury Verdict*

The complaint alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. Pendent state law claims were also brought under Massachusetts tort and contract law and the Massachusetts Civil Rights Act (MCRA), Mass. Gen. L. ch. 12, §§ 11H and 11I. The case was jury tried.

The jury, in answer to special interrogatories, rendered the following verdict on the federal claims. It found that defendants violated the ADEA and awarded Biggins \$560,775 in damages. It also found that the ADEA violation was willful. On Biggins' ERISA claim, the jury found that defendants discharged the plaintiff in order to prevent his pension benefits from vesting. Biggins was awarded \$100,000 in damages on the ERISA claim.

The jury found for the plaintiff on four Massachusetts law claims. First, on the wrongful discharge claim, the jury found that the defendants agreed to compensate Biggins by giving him shares of company stock, and that the defendants wrongfully discharged Biggins in order to deprive him of this promised stock compensation. The jury awarded plaintiff one dollar in compensatory damages on the wrongful discharge claim. The jury also found that the defendants committed fraud by failing to compensate Biggins with the stock he had been promised; it

awarded him \$315,098 in damages for the fraud. The jury further found that the plaintiff and the defendants had a contract other than of at-will employment, and that the defendants breached this employment contract when they discharged him. Biggins was awarded \$266,897 in compensatory damages on this claim. Finally, the jury found that the defendants violated the Massachusetts Civil Rights Act because they interfered with Biggins' exercise of his civil rights through the use of threats, intimidation or coercion. The jury awarded Biggins one dollar in damages on this claim.

The jury was also asked to determine if Biggins was the inventor, developer, and sole rightful owner of a paper coating formula and method that was developed while he worked for the defendants. The jury found that he was not.

B. *District Court Rulings on Post-Trial Motions*

After the verdict, both the defendants and the plaintiff filed post-trial motions. Defendants filed a motion pursuant to Fed. R. Civ. P. 50(b) for j.n.o.v. or, in the alternative, for a new trial. Defendants also moved to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff moved for an award of costs and attorney's fees under federal and state law. Plaintiff also requested that the district court enhance any award of attorney's fees to an amount equal to one-third of the damages awarded.

The court ordered j.n.o.v. on the jury's finding that the ADEA violation was willful. That finding, if sustained, would have required an additional payment of liquidated damages equal to the amount of damages awarded for the ADEA violation. The court also ordered j.n.o.v. on the finding of a violation of the Massachusetts Civil Rights Act. In all other respects the court denied the defendants' motion for j.n.o.v. or a new trial. The court also denied the defendants' motion to alter or amend the judgment.

On plaintiff's post-trial motions, the district court further

ruled that Biggins was entitled to prejudgment interest "on his entire award because plaintiff is not entitled to liquidated damages." The court granted plaintiff's motion for attorney's fees in the amount of \$175,564.57 and for costs in the amount of \$9,760.07. It declined to enhance the award of attorney's fees.

C. The Issues on Appeal

The defendants raise three issues on appeal: (1) whether the district court erred in denying their motions for directed verdict and j.n.o.v. on all the claims submitted to the jury; (2) whether the district court erred in denying the defendants' motion to alter or amend the judgment because the damages awarded were excessive, duplicative, and unsupported by the evidence and because the award of prejudgment interest was erroneous as a matter of law; and (3) whether the district court erred in denying defendants' motion for a new trial because the verdict was against the clear weight of the evidence.

Biggins raises three issues on cross-appeal: (1) whether the court erred in granting j.n.o.v. on the jury's finding that the ADEA violation was willful; (2) whether the court erred in granting j.n.o.v. on the Massachusetts Civil Rights Act claim; and (3) whether the court erred by applying the wrong standard in determining the amount of attorney's fees and expenses to be awarded plaintiff.

We apply the same standard of review to the district court's grant or denial of motions for directed verdict and j.n.o.v. See *Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1383 (1st Cir. 1991). The standard is *de novo* review "which means that we use the same stringent decisional standards that control the district court." *Hendricks & Assocs., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991). The standard has been elucidated as follows:

The district court may grant judgment notwithstanding the verdict "only after a determination that the evidence could lead a reasonable person to only one conclusion," . . . namely, that the moving party was entitled to judgment[.]...

The district court "may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence." The trial court is "compelled, therefore, even in a close case, to uphold the verdict" unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion."

Id. at 214 (citations omitted). We review the evidence in our discussion of the issues.

II. THE ADEA CLAIM

A. Sufficiency of the Evidence

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the foundation case on the order and allocation of proof in an employment discrimination case, where, as here, there is no direct proof of discrimination. The plaintiff must first prove a *prima facie* case. If this is done, the burden then shifts to the employer to articulate some nondiscriminatory reason for the employee's termination. *Id.* at 802. If this is done, the plaintiff has the opportunity to show that the reasons advanced were a cover-up for a discriminatory employment decision. *Id.* at 805. See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978).

There is no doubt that plaintiff here made out a *prima facie* case of age discrimination. He was within the protected age

group. He was sixty-two years old at the time of his termination. He was performing his work at a level that met his employer's legitimate expectations. And he was replaced by someone younger than himself with roughly similar qualifications. See *Mesnick v. General Elec. Co.*, ___ F.2d ___, No. 91-1451, slip. op. at 9-10 (1st Cir. Dec. 16, 1991); *Medina-Munoz v. R. J. Reynolds Tobacco Co.*, 896 F.2d 5, 8-9 (1st Cir. 1990).

In *Connell v. Bank of Boston*, 924 F.2d 1169 (1st Cir.) cert. denied, 111 S. Ct. 2828 (1991), we held that

[i]f a *prima facie* case is made, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for plaintiff's discharge. The articulation of such a reason nullifies the inference raised by the *prima facie* case. Plaintiff must then clear the second hurdle by showing that the employer's articulated reasons were only a pretext for age discrimination. The plaintiff is required to "do more than simply refute or cast doubt," on the employer's rationale. He must "also show a discriminatory animus based on age." The key question becomes whether the employer fired plaintiff because of his age. We do not second-guess the business decisions of an employer.

Connell, 924 F. 2d at 1172 (citations and footnotes omitted). The defendants in this case articulated legitimate nondiscriminatory reasons for Biggins' discharge. The question is whether there was sufficient evidence for the jury to find that defendants fired plaintiff because of his age. We find that there was.

In order to understand the ADEA evidence we must first outline the evidentiary contours of the case. Hazen Paper Company is a small and successful business located in Holyoke, Massachusetts. It is privately owned and operated by two cousins, Robert Hazen and Thomas N. Hazen. Robert Hazen is the company's president and Thomas Hazen is its treasurer. The company is engaged in the manufacture of coated, foil laminated,

and printed paper and paperboard for use in such products as cosmetic wrap, lottery tickets, and pressure sensitive items. It is known as a paper converter.

Biggins was hired by Hazen Paper in 1977 as its first technical director. There was no written employment contract. Biggins was fifty-two years old when he was hired. He held a Bachelor's degree and a Master's degree in chemistry and had spent his prior work life as a technician-chemist in the paper industry.

Biggins worked for Hazen Paper for over nine and one-half years. One of the problems that Hazen Paper and the paper converter industry faced at the time Biggins started his employment was the elimination of hazardous emissions from the nitrocellulose and vinyl coatings then in general use. The elimination of such emissions was mandated by the Clean Air Act. Biggins developed a water-based paper coating that both exceeded the requirements of applicable environmental laws and resulted in a superior product in terms of gloss and durability.

By the mid-1980s that coating, referred to at trial as "Biggins Acrylic," was widely used by Hazen Paper. The company's sales increased substantially as a result of the use of the coating developed by Biggins. In 1983 Biggins became aware of this increase in sales and of the fact that the commissions of one of its sales representatives, Robert Hutchinson, had increased dramatically (to over \$200,000). Because he felt that these sales commissions were being made on "something that I had developed," Biggins sought an increase in pay from the company. After a meeting in 1983 with Thomas and Robert Hazen, Biggins' salary was increased by ten percent.

Biggins, however, remained dissatisfied with his compensation. In 1984, Biggins again sought an increase in his salary, which by this time was \$44,000. Biggins testified that in July of 1984 he approached Thomas Hazen to tell Hazen that he wanted a raise and that he thought he was worth \$100,000 to the company. According to Biggins, Hazen told him that "nobody in the company" was being paid that amount and that Hazen could not give him a salary increase to \$100,000. Biggins testi-

fied that Hazen nonetheless indicated that "he would be willing to give me a piece of the company in stock, and that . . . my fortune could increase as the fortunes of the company did." Biggins also stated that Hazen said that he was prepared to "mak[e] up the difference between my salary and \$100,000 in stock." Thomas Hazen denied emphatically that he promised to give Biggins any stock.

While Biggins was working for Hazen Paper, he also was involved in two private business ventures with his son. One had to do with cleaning up hazardous wastes and recovering dirty solvents produced by automobile repair shops and paper companies. The other venture was a consulting business in the environmental/ regulatory compliance area, which involved explaining to small businesses what was required under applicable regulations. When Thomas Hazen learned of the clean-up business, he concluded that Biggins had taken personal advantage of his employment at the company and that there was a great risk of Biggins disclosing company secrets to its competitors. Thomas Hazen and his cousin, Robert, told Biggins that this activity was "outrageous." Thomas Hazen had a confidentiality agreement drawn up which restricted Biggins' outside activities during his employment and for a limited time after his employment ceased. Biggins indicated he would sign the agreement if he was given a raise, but Thomas Hazen would not agree to this. He told Biggins that unless he signed the agreement as it stood, his employment would be terminated. Biggins refused to do so and his employment with Hazen Paper ceased on June 13, 1986. At the time Biggins was terminated, his pension rights, which were worth about \$93,000, had not vested. They would, however, have vested a few weeks later if Biggins had not been fired.

We now turn to the evidence bearing directly on the ADEA claim. Biggins testified that both Robert and Thomas Hazen made critical comments about his age. On one occasion, Robert Hazen took out a membership for company employees in a handball court in Holyoke. At that time he told Biggins and

another employee, who was a year older than Biggins, that it would not do them much good because they were "so old." On another occasion, Thomas Hazen reminded Biggins that it was costing the company a lot more for his life insurance policy because he was "so old."

The most significant evidence on the ADEA claim comes from the facts and circumstances surrounding the termination of Biggins' employment. Biggins was asked by Thomas Hazen to sign a confidentiality agreement in the spring of 1986 because, according to Hazen, he felt that Biggins' outside business venture was improper and a threat to the company. Negotiations relative to Biggins signing the confidentiality agreement continued for weeks, during which time Biggins stated repeatedly that he would not sign the agreement unless his remuneration was increased. Thomas Hazen brought matters to a head by telling Biggins on June 13, 1986, that there would be no pay increase, and unless he signed the agreement he would be fired. Biggins refused to do so and his employment was terminated on that date.

Defendants hired a younger man to replace plaintiff, one Timothy McDonald. A confidentiality agreement was given to McDonald. It provided for 100 days separation pay. By contrast, the confidentiality agreement offered Biggins had no such provision for severance pay. McDonald's agreement also contained a six-month non-competition clause. In the agreement tendered the plaintiff, the non-competition clause was for two years.

As of June 13, 1986, Biggins had worked for the defendants for more than nine and one-half years. He was sixty-two years old. It is uncontradicted that had Biggins worked for the company a few more weeks, his right to a pension would have vested. There was uncontradicted evidence that at the time of Biggins' termination no one else in the company was subject to a confidentiality agreement.

There was additional testimony that when Thomas Hazen was told by Biggins that he would not sign the confidentiality

agreement unless it was accompanied by an increase in remuneration, Hazen suggested Biggins become a consultant to the company. Biggins would then no longer have been an employee of the company and would have lost his rights to all employee benefits. Finally, Thomas Hazen testified that he was "absolutely" aware that age discrimination was illegal.

Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.

Based on our review of the evidence, we find that it was within the province of the jury to decide whether age was a determining factor in the defendants' decision to terminate Biggins' employment.

B. Was There a Willful Violation of the ADEA?

The enforcement section of the ADEA contains the following provision: "Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. §626(b). The ADEA, in § 626(b), adopts the definition of liquidated damages established in the Fair Labor Standards Act, 29 U.S.C. § 216(b). Liquidated damages are defined as an amount equal to the pecuniary losses suffered by the discharged employee by way of lost wages, salary increases and other benefits. See *Air Line Pilots Ass'n., Int'l v. Trans World Airlines, Inc.*, 713 F. 2d 940, 956 (2d Cir. 1983), *aff'd in part and rev'd in part sub nom. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

In reviewing the *Trans World Airlines* case, which focused on the application of a company-wide plan or policy, the Supreme Court held that an acceptable definition of "willful violation" was the one used by the Second Circuit: "[A] violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Thurston*, 469 U.S. at 128 (citation omitted). The Court held that "Congress intended for liquidated damages to be punitive in nature." *Id.* at 125. The Court noted:

Courts below have held that an employer's action may be "willful," within the meaning of § 16(a) of the FLSA, even though he did not have an evil motive or bad purpose. We do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under §7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020, n. 27 (CA1 1979).

Id. at 126 n.19 (citation omitted). This means, as we understand it, that evil purpose or bad motive are not necessary components of a willful violation.

In a subsequent Fair Labor Standards Act case the Court reaffirmed the definition of a willful violation enunciated in *Thurston*. "The standard of willfulness that was adopted in *Thurston* — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

As already noted, *Thurston* involved the application of a company policy to a group of employees. The courts of appeals have had some trouble fitting the *Thurston* standard of willfulness to disparate treatment cases. As a result the circuits have arrived at differing interpretations and modifications of *Thurston*. We, therefore, turn to a review of the relevant cases before

attempting to formulate our own definition of willfulness in a disparate treatment case.

The Second Circuit has taken a "continuum" approach.

In light of *Thurston*, we think that "willfulness" is most easily understood when the term is analyzed along a continuum. Using that concept, at one extreme there is no liability for liquidated damages when a plaintiff proves only that the employer acted negligently, inadvertently, innocently, or even, if the employer was aware of the applicability of the ADEA, and acted reasonably and in good faith. See *McLaughlin*, 108 S. Ct. at 1681-82. The opposite point of the spectrum is revealed when a plaintiff establishes that the employer had an evil motive: such showing is sufficient for double damages, but is not necessary for an award of liquidated damages. See *Thurston*, 469 U.S. at 126 n. 17, 105 S. Ct. at 624 n. 17. Thus, in the middle of the spectrum, double damages may properly be awarded when the proof shows that an employer was indifferent to the requirements of the governing statute and acted in a purposeful, deliberate, or calculated fashion.

Benjamin v. United Merchants and Mfrs, Inc., 873 F.2d 41, 44 (2d Cir. 1989).

The Third Circuit has added a requirement of "outrageous conduct" to the *Thurston* factors:

Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.

Dreyer v. Arco Chemical Co., Div. of Atlantic Richfield Co., 801 F.2d 651, 658 (3d Cir. 1986). The Third Circuit felt that

under *Thurston* it "must interpret the liquidated damages provisions in a way that would not permit 'an award of double damages in almost every case'" *Id.* at 657 (citation omitted). It found its basis for adding this requirement of outrageous conduct in the Restatement (Second) of Torts §908(2). *Id.* The Court also held: "If an employer can show good faith and reasonable grounds for believing it was not in violation of the Act, a willfulness finding would be inappropriate." *Id.* at 658 (citations omitted). See also *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 346 (3d Cir. 1990).

In *Taylor v. Home Insurance Company*, 777 F.2d 849, 859 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986), the Fourth Circuit adopted the *Thurston* definition of willfulness without discussion.

The Fifth Circuit has interpreted *Thurston* to mean that "good faith" is no longer a valid defense to a willfulness claim:

Under the *Thurston* rule, however, "good faith" can no longer coexist with "willfulness." The result is that only "knowing" or "reckless" violations of the ADEA are subject to liquidated damages. Thus, a further examination of good faith becomes irrelevant because it has already been factored into the *Thurston* "willfulness" definition.

Powell v. Rockwell Int'l Corp., 788 F.2d 279, 287 (5th Cir. 1986). In *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989), the court appears to have added an egregious violation requirement to the *Thurston* standard of "knowing or reckless disregard":

The Supreme Court has held that liquidated damages are a punitive sanction and should be reserved for the most egregious violations of the ADEA. Liquidated damages should not be awarded unless the defendant acted knowingly or recklessly.

The evidence in this case was weak. There is simply no

evidence that Pepsi's actions were so egregious as to justify finding a willful violation. Pepsi was entitled to judgment on this issue.

Id. at 1470 (citations omitted).

In *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the Sixth Circuit followed the Tenth Circuit and held that a defendant's conduct could be willful "only if age was the predominant factor in the decision to terminate the plaintiff." *Id.* at 158. See also *Wheeler v. McKinley Enter.*, 937 F.2d 1158, 1164 (6th Cir. 1991).

The Seventh Circuit follows *Thurston's* knowing or reckless disregard definition. *Brown v. M & M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989). It squarely rejected the Third Circuit's addition of outrageous conduct to the *Thurston* formula. *Id.* at 513.

The Eighth Circuit applies the *Thurston* standard as follows:

We think *Thurston* means at least this: if the people making the employment decision know that age discrimination is unlawful, and if there is direct evidence -- more than just an inference from, say, an arguably pretextual justification -- of age-based animus, the trier of fact may properly find willfulness.

Neufeld v. Searle Lab., 884 F.2d 335, 340 (8th Cir. 1989). See also *Beshears v. Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991).

The Ninth Circuit follows the *Thurston* standard unadorned and has applied it retroactively. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986).

The Tenth Circuit, after a careful analysis of *Thurston* and a survey of the standards adopted in other circuits, held:

Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of possibly several "determinative factors" in the employer's conduct; for a willful violation to exist in a disparate treat-

ment claim, a factfinder must find that age was the predominant factor in the employer's decision.

Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1551 (10th Cir. 1988).

The Eleventh Circuit follows *Thurston* without qualification. *Formby v. Farmers & Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990). See also *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099-1101 (11th Cir. 1987).

Finally, we turn to our own circuit. *Loeb v. Textron Inc.*, 600 F.2d 1003 (1st Cir. 1979), which was decided before *Thurston*, is the seminal case.¹ Our definition of willfulness as requiring bad purpose has been rejected by *Thurston*. See *Thurston*, 469 U.S. at 126 n.19. Specific intent to violate the ADEA is, therefore, not required to establish a willful violation.

In *Loeb*, after discussing the jury instructions on application of the *McDonnell Douglas* formula to an ADEA violation claim, we adopted the following standard governing proof of an ADEA violation:

We do not quarrel with the court's statement that age did not have to be the sole factor motivating defendants to act; we do think, however, that the court should have instructed the jury that for plaintiff to prevail he had to prove by a preponderance of the evidence that his age was the "determining factor" in his discharge in the sense that, "but for" his employer's motive to discriminate against him because of age, he would not have been discharged.

¹ *Loeb* held, *inter alia*, that in this circuit good faith could not be used as a defense in an ADEA case. *Id.* at 1020. We agree with the Fifth Circuit's decision in *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 287 (5th Cir. 1986), that *Thurston* has rendered the issue of good faith irrelevant.

Loeb, 600 F.2d at 1019. The "determining factor" or "but for" test has been consistently followed by us in ADEA cases in which the *McDonnell Douglas* formula applies. See e.g., *Mesnick v. General Electric Co.*, No. 91-1451, slip. op. at 11-13; *Connell*, 924 F.2d at 1172; *Medina-Munoz*, 896 F.2d at 9; *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1110-11 (1st Cir. 1989); *Menard v. First Sec. Serv. Corp.*, 848 F.2d 281, 285 & 287 (1st Cir. 1988).

In this circuit, the "determining factor" ingredient added by the Sixth and Tenth Circuits to the *Thurston* standard for proof of a "willful" violation of ADEA in disparate treatment cases is already a basic requirement for proof of the underlying ADEA violation itself.

With due respect, we cannot accept the Third Circuit's outrageous conduct requirement. This seems to us to fly in the face of *Thurston*, and we find the term "outrageous" simply too amorphous to be of assistance in determining what constitutes a willful violation.

We, therefore, adopt, without modification or qualification, the *Thurston* test for willfulness: "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Thurston*, 469 U.S. at 128 (citation omitted). We realize that in many cases this will result in a willful violation following hard on the heels of an ADEA violation, but that is the nature of the beast in a disparate treatment case, at least until either the Congress or the Supreme Court changes the definition of willfulness. See *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1067 (7th Cir. 1989).

We now apply the standard to this case. The principal owner of the company, Thomas Hazen, testified that he was "absolutely" aware that age discrimination was illegal. This is as strong evidence of a knowing violation of ADEA as a plaintiff could wish. In his charge to the jury, the district judge instructed that "age must have been the determining factor" in plaintiff's discharge for the defendant's to be found liable. This was

in accord with the rule of this circuit. The court's instruction on willfulness was as follows:

I will now instruct you on the meaning of willfulness.

Under Federal law, an act is done willfully if done voluntarily and intentionally, and with a specific intent to do something the law forbids.

You may find that Defendants willfully violated the age discrimination law if you find that one, that Defendants knew of or showed reckless disregard for, the law prohibiting age discrimination.

And two, that Defendants, with bad purpose, intentionally disobeyed or ignored the law.

In sum, if you find in Plaintiff's favor on the age discrimination claim, you must also decide whether the Plaintiff proved by a preponderance of the evidence that the violation was willful. You should not award any damages for the willfulness of the violation itself. You need only decide whether the violation of the age discrimination law is willful.

This instruction went further than necessary because the "bad purpose" requirement established by this circuit in *Loeb* was eliminated by *Thurston*. 469 U.S. at 126 n.19. The instruction misstated the applicable law, and thereby prejudiced the plaintiff because it held him to a higher standard of proof than is required by *Thurston* and this circuit.

Because the jury nonetheless found in plaintiff's favor, however, the error was harmless. The jury's finding of a willful violation of the ADEA had a solid evidentiary foundation and was in accord with jury instructions that correctly stated the applicable law except as to the requirement of "bad purpose." It was error for the district court to grant defendants' motion for j.n.o.v. on this count. The finding by the jury that there was a willful violation is reinstated.

C. Damages Under the ADEA

We next address the defendants' claim that the ADEA damages award was excessive, duplicative, and contrary to the evidence. Plaintiff suggests that defendants are foreclosed from raising this issue now because it was not raised below. Our review of the record discloses that, although it was not raised as explicitly below as it is here, it was argued sufficiently in defendants' post-trial motions so that the court was aware of its contours and implications. See Memorandum and order, *Biggins v. Hazen Paper Company*, No. 88-00225-F, slip. op. at 35-36 (D. Mass. filed April 5, 1991).

Ruling on the defendants' motion for a new trial, the district court stated:

It is uncontested that plaintiff alleged total damages in the amount of \$1,375,614.12. Plaintiff offered the testimony of Dr. Moore and Mr. Moriarty in support of that allegation, and their testimony was unrefuted. It is also true that the jury awarded a total of \$1,242,772.00 in damages on all seven counts, some \$132,842 less than the damages claimed by plaintiff. Because the jury did not select for total damages a figure higher than that alleged by plaintiff and evidenced in the record, the Court will not set aside any portion of the verdict on this basis.

Id. at 36 (citations omitted). We think the ruling contained in the last sentence of this order was error. Damages should not have been treated on an across-the-board basis. The jury was instructed on damages count by count and returned an award on each count separately. The damages awarded on each count should have been examined separately, not as a lump sum. This is particularly so in an ADEA award because liquidated damages always loom over the award.

Defendants argue that the evidence established that plaintiff's pretrial losses for the ADEA violation totalled \$419,454.38

and that the award of \$560,775.00 was excessive by the amount of \$141,320.62. Plaintiff counters that there was evidence from which the jury could have awarded damages in excess of \$650,000.

Plaintiff put in evidence, as exhibit 21, a document entitled "Summary of Loss." It was in effect a summary and condensation of the testimony of the two expert witnesses on damages who testified on behalf of plaintiff. The damages to which plaintiff was entitled for the ADEA violation were as follows: cash loss - \$234,841.55; bonus loss - \$131,275.88; lost benefits - \$53,336.95. These sums totalled \$419,454.38. This was all for which there was evidentiary support.¹

The jury award of \$560,775 is reduced to \$419,454.38. Because we have found that there was a willful violation of the ADEA, plaintiff is entitled to liquidated damages equivalent to the amount. Damages on the ADEA count, therefore, amount to \$838,908.76.

III. THE ERISA CLAIM

Defendants argue that the jury verdict finding liability under ERISA was erroneous as a matter of law because there was no evidence to support a reasonable finding that plaintiff was discharged with the specific intent of interfering with his pension vesting. We need not linger long on this issue. Plaintiff was discharged within weeks before the vesting of his pension. Although plaintiff was fired ostensibly because he refused to sign the confidentiality agreement, the jury could have found that the real reason was to deprive him of his pension benefits.

¹ In this exhibit, the plaintiffs also alleged an additional "stock loss" of \$342,498. On appeal, plaintiffs do not argue that the jury's award of damages in excess of \$419,454.38 could have been derived from this figure. We also note that, as discussed in Part V, *infra*, we consider the stock loss for which Biggins recovered on the common law fraud claim separate and distinct from the \$419,454.38 in back pay recovered under the ADEA claim.

The jury was entitled to draw reasonable inferences from the proximity of the date of firing and the date of vesting of plaintiff's pension.

We agree with the defendants that there should be a remittitur on the jury award of \$100,000, but not of \$30,000. Viewing the evidence in the light most favorable to the plaintiff, the jury could have found that he was deprived of pension funds worth \$93,000. There is no basis in the record for an amount greater than that. There must, therefore, be a remittitur on this count of \$7,000.

IV. MASSACHUSETTS LAW CLAIMS

The defendants also challenge the district court's denial of their motions for directed verdict and j.n.o.v. on three of the Massachusetts law claims, contending that the evidence could not reasonably have permitted the jury to find in favor of Biggins. Specifically, the appellants challenge the sufficiency of the evidence to sustain findings of liability against them under Massachusetts law for (1) wrongful discharge; (2) common law fraud; and (3) breach of a contract embodied in the Hazen Paper Company's 1980 Employee Handbook. On cross-appeal, Biggins contests the district court's grant of j.n.o.v. reversing the jury's finding of liability against the defendants under the Massachusetts Civil Rights Act. We apply the same *de novo* standard of review on the state law claims as we did on the federal claims.

A. Wrongful Discharge

Count IV of the complaint charged the defendants with "wrongful discharge" of Biggins in violation of Massachusetts law governing the termination of at-will employment. In *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), the Massachusetts Supreme Judicial Court recognized that "an employer may not in every instance terminate

without liability an employment contract terminable at will." *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908, 910 (1982). *Fortune* and subsequent decisions establish that an enforceable claim for breach of a contractual condition of good faith will lie when the termination of an at-will employee is contrary to public policy. *Cort*, 431 N.E.2d at 910. See also *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21, 27-29 (1981); *Tenedios v. Wm. Filene's Sons Co.*, 20 Mass. App. Ct. 252, 479 N.E. 2d 723, 726 (1985); *Siles v. Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, 106, *app. denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

In *Cort* and *Gram*, the Massachusetts Supreme Judicial Court found that an "employer's predatory motivation . . . can be classified as a reason contrary to public policy." *Cort*, 431 N.E.2d at 910; *Gram*, 429 N.E.2d at 29. In *Gram*, the Supreme Judicial Court held that

the obligation of good faith and fair dealing imposed on an employer requires that the employer be liable for the loss of compensation that is so clearly related to an employee's past service, when the employee is discharged without good cause.

Gram, 429 N.E.2d at 29. In establishing these principles governing the liability of an employer for an employee's discharge in the absence of good cause, the *Gram* court was careful to distinguish between recovery based on the employee's loss of future wages for *past* services, and any claim for recovery based on loss of *future* income for future services. *Id.* The Massachusetts Supreme Judicial Court explicitly limited this theory of "wrongful discharge" to situations in which the employee's discharge without good cause deprives the employee of compensation for services previously earned or past services. *Cort*, 431 N.E.2d at 908. In order to establish a claim of wrongful termination, the discharge must be

contrived to despoil an employee of earned commission or similar compensation due for past services That the plaintiff was fired arbitrarily and was injured in her expectations of future wages or other future emoluments does not, without more, encompass the *Fortune*-type of liability, however meretricious we may consider the dismissal to have been.

Tenedios, 479 N.E.2d at 726 (citations omitted).

In the instant case, the jury found that the defendants had agreed in 1984 to compensate Biggins with shares of Hazen Paper Company Stock. It also found that the defendants wrongfully discharged Biggins in 1986 in order to deprive him of the promised stock compensation. The jury awarded one dollar in compensatory damages. In motions for directed verdict and j.n.o.v., the defendants attacked the legal sufficiency of the evidence to support a finding of wrongful discharge. In both motions, they insisted that the promise of stock to Biggins was not an enforceable contract. They argued that a contract could not have been formed because Biggins did not own the formula for the acrylic process which he allegedly used as the bargaining chip for the stock. Lack of ownership of the rights to that formula meant that Biggins could not have given any consideration in return for the promise of stock. Consequently, the defendants claimed that because there was no consideration for the alleged stock agreement, there was no enforceable contract for the payment of stock, and therefore no deprivation of past "compensation" already earned within the meaning of *Fortune* and its progeny.

The district court rejected these arguments, holding that Biggins provided "ample consideration" for the alleged stock agreement — namely, "the present and continued satisfactory performance of services for Hazen Paper Company." The court noted that the jury's rejection of Biggins' claim of ownership of the acrylic formula precluded argument by Biggins that his ownership of the formula constituted valid consideration for

the stock promise. Nonetheless, the court concluded that Biggins' continued service as an employee of the company subsequent to the alleged stock promise would in and of itself constitute adequate consideration for any stock agreement.

On appeal, the defendants renew the argument that the evidence was legally insufficient to establish that Thomas Hazen's promise of stock to Biggins in 1984 was earned, contractually-established "compensation." They insist that there can be no *Fortune*-based claim because Biggins failed to establish any contractual expectancy that was in fact defeated by reason of his discharge from employment.

Viewing the evidence in the light most favorable to the non-moving party, we find that the district court correctly concluded that there was adequate evidence to support the jury's finding that consideration sufficient to support an agreement for "compensation" inhered in Biggins' continued performance of services for the Hazen Paper Company. Biggins testified that when he requested a raise in his annual compensation in 1984, Thomas Hazen promised to give him stock worth the difference between his preexisting \$44,000 annual compensation and a \$100,000 annual compensation level. The jury could have found that Biggins' decision to continue as an employee with Hazen Paper was consideration for an agreement to increase his annual compensation. See *Jackson v. Action for Boston Community Dev., Inc.*, 403 Mass. 8, 525 N.E.2d 411, 415 (1988) (citing *Simons v. American Dry Ginger Ale Co.*, 335 Mass. 521, 526, 140 N.E.2d 649 (1957)) (for an employee to remain with employer can, in appropriate circumstances, supply adequate consideration for employment contract). We, therefore, hold that there was adequate evidence to support the jury's finding that Biggins' discharge in 1986 deprived him of "compensation" for past services within the meaning of Massachusetts wrongful discharge doctrine.

We find unavailing appellants' continued insistence that any promise of stock by Thomas Hazen to Biggins could never have

constituted an enforceable contract.³ The appellants renew the argument made below that any offer of stock by Thomas Hazen which did not specify the quantity or class of stock promised, or the time of its delivery to Biggins, would lack the requisite definiteness to be enforced as a contract. We think that the issue of whether Thomas Hazen's alleged offer of stock was sufficiently definite was a question of fact, which the jury could properly resolve in favor of Biggins. See, e.g., *Rizzo v. Cunningham*, 303 Mass. 16, 20 N.E.2d 471, 474 (1939) ("where a contract is oral, the question of what the contract is must, if controverted, be tried by a jury as a question of fact . . .").⁴ There was evidence for the jury to find that Hazen's promise of an amount of stock necessary to raise Biggins' annual compensation to the amount of \$100,000 was sufficiently definite to create an enforceable contract.⁵

³ Appellants claim that "plaintiff at no time suggested in any of his pleadings below that he was entitled to Hazen Paper stock as a matter of contract law." We note that ¶ 11 of Biggins' Amended Complaint alleges that in response to Thomas Hazen's promise that he would provide Biggins with stock "sufficient to raise his salary . . . [to] \$100,000[,] [t]he plaintiff agreed to this offer and in reliance on the defendant's promise continued to allow the defendant company to make use of his formula and process . . . and continued his employment with the defendant corporation." (Emphasis added). While Biggins did not allege any independent claim of breach of contract based on failure to deliver the allegedly promised stock, it is clear that in his wrongful discharge claim Biggins alleged the contractual elements necessary to support a claim of deprivation of previously earned "compensation."

⁴ In *Rizzo*, the Massachusetts Supreme Judicial Court reinstated a jury verdict in favor of a plaintiff seeking to recover on an oral contract for personal services. The Court concluded that "the conversation upon which the jury was permitted to find an agreement . . . was not too vague and indefinite to form the basis for a contract." 20 N.E.2d at 475.

⁵ The appellants also argue that any contract based on an agreement to give Biggins stock in the Hazen Company would not be enforceable because it was an oral promise unsupported by a writing that would fail under the Massachusetts statute of frauds. In the district court below, however, appellants never raised this argument, preferring instead to rely on assertions that there could have been no consideration for any contract based on Biggins' ownership of the formula for the acrylic. Because the defendants did not raise these objections in the district court, we decline to address them on appeal. See, e.g., *Boston Celtics Ltd. Partnership v. Shaw*, 908 F.2d 1041, F045 (1st Cir. 1990).

Because the jury could have determined that Hazen's promise of stock was an enforceable oral contract properly supported by consideration, we see little merit in the appellants' other arguments challenging the adequacy of proof of various elements necessary for Biggins to make out his wrongful discharge claim. The defendants insist that the promise of stock was ambiguous as to the time of its delivery and that any "compensation" due Biggins was "future" rather than "past" earnings -- and therefore not properly recoverable under the *Fortune* doctrine. This argument is without merit. If Biggins was promised stock in 1984 sufficient to raise his overall annual compensation to \$100,000, the jury had ample evidence to determine that his discharge from Hazen Paper Company in 1986, without delivery of the promised stock, was a deprivation of "past" earnings. Equally lacking in merit is appellants' argument that Biggins' discharge in 1986 did not directly cause him to forfeit the promised stock. We can see no distinction between the situation of an employee whose discharge is intended by his employer to deprive him of previously earned wages or sales commissions, and that of an employee discharged by his employer in order to deprive him of stock promised as supplemental annual compensation. A jury could in both instances find that this discharge was "contrived to despoil an employee of earned commission or similar compensation due for past services *Tenedios*, 479 N.E.2d at 726 (citations omitted)."

B. Common Law Fraud

Defendants next attack the sufficiency of the evidence supporting the jury's verdict awarding \$315,098 in damages on Biggins' claim of common law fraud. The defendants contend that the district court improperly denied its motions for directed verdict and j.n.o.v. because the evidence did not sufficiently establish certain of the elements necessary to sustain a fraud claim under Massachusetts law. As we observed in one such case under Massachusetts common law,

the standard for setting aside a jury verdict is a rigorous one. . . . [W]e must find that no jury could reasonably find that all five elements of common law fraud were met with respect to the alleged misrepresentation and omissions. These elements are: (1) that the statement was knowingly false; (2) that [the defendant] made the false statement with intent to deceive; (3) that the statement was material to the plaintiffs' decision to [enter] the contract; (4) that the plaintiffs reasonably relied on the statement; and (5) that the plaintiffs were injured as a result of their reliance.

Turner v. Johnson & Johnson, 809 F.2d 90, 95 (1st Cir. 1986).

The defendants' principal contention on appeal is that the evidence was not sufficient to establish that Biggins relied on the stock promise to his detriment and thereby suffered damages as a result of his remaining as an employee at Hazen Paper.⁶ The defendants insist that Biggins offered no evidence to show that he gave up other employment opportunities as a result of the promise of the stock, or that he remained Hazen Paper after 1984 *because* of the promise. The defendants also challenge the district court's denial of j.n.o.v. on their argument that the detrimental reliance element was lacking. They argue that the district court misconstrued Massachusetts law when it held that Biggins had satisfied the detrimental reliance element by the simple fact of his remaining as an employee of the company subsequent to the stock promise.

Proof of detrimental reliance is a necessary element of a fraud claim under Massachusetts law. See *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 563 N.E.2d 188, 192 (1990) (citing *Barrett Assocs., Inc. v. Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867 (1963)); *Robertson v. Gaston Snow Ely Bartlett*,

⁶ The defendants also challenge the adequacy of the fraud claim with an argument not raised in either of their motions for directed verdict and j.n.o.v. in the district court. They now claim that Thomas Hazen did not make a false promise of stock to Biggins with the present intention not to fulfill that promise. Appellants waived this argument through their failure to present it to the district court. See *Boston Celtics Ltd. Partnership*, 908 F.2d at 1045.

404 Mass. 515, 536 N.E.2d 344, 349, *cert. denied*, 493 U.S. 894 (1989); *Snyder v. Sperry & Hutchinson Co.*, 368 Mass. 433, 333 N.E.2d 4211 428 (1975); *Schinkel v. Maxi-Holding, Inc.*, 30 Mass. App. Ct. 41, 565 N.E.2d 1219, 1224, *review denied*, 409 Mass. 1104, 569 N.E.2d 832 (1991). At the outset, we note that we agree with the district court's conclusion that Biggins could not have suffered "detriment" as a result of a loss of rights to the formula under the terms of a stock agreement with the defendants. Because the jury found that Biggins never in fact owned the formula, he cannot assert that he relied on Thomas Hazen's stock promise to his detriment when he gave up various offers to sell the rights to that formula abroad.⁷ Thus, in order for the jury to have properly reached its finding of fraud by the defendants, it must be shown there was other evidence legally sufficient to establish Biggins' detrimental reliance.

The district court's denial of j.n.o.v. rested on the finding that Biggins' "rendition of present and continuing services at Hazen Paper Company provide[d] the legal detriment for the fraud claim." That conclusion, in turn, relied on the assumption that under Massachusetts law, Biggins' continued services "in exchange for the stock promise [was] sufficient to provide 'detrimental reliance.'" After review of the applicable case law, we hold that the district court correctly interpreted Massachusetts law when it concluded that under the circumstances Biggins' continued employment was a legally sufficient form of detrimental reliance that could have supported the jury's verdict.

Massachusetts law recognizes that an affirmative act by the victim of fraudulent conduct is not required to establish the element of detrimental reliance:

⁷ In any case, the record does not support Biggins' repeated insistence that the jury was presented with evidence showing that he gave up a specific opportunity to sell the rights to the formula after the alleged stock-for-rights agreement with Hazen in 1984.

It is the settled law of this Commonwealth in actions for deceit . . . that the representations need not be the sole or predominating motive that induced the victim to part with his money or property, but that it is enough if they alone or with other causes materially influenced him to *take the particular action that the wrongdoer intended he should take as a result of such representations and that otherwise he would not have taken such action.*

National Shawmut Bank v. Johnson, 317 Mass. 485, 58 N.E.2d 849, 852 (1945) (citations omitted and emphasis added). See also 14A D. Simpson & H. Alperin, *Massachusetts Practice: Summary of Basic Law* § 1795 (1974) (reliance can be shown where the victim of fraud "does not do what he had intended and started to do and would have done save for the fraud practiced upon him"); Restatement (Second) of Torts § 531 (1977) ("[O]ne who makes a fraudulent misrepresentation is subject to liability to the person[] . . . whom he intends or has reason to expect to act or refrain from action in reliance upon the misrepresentation. . . ."). In a situation in which the object of an employer's fraud is to prevent an employee from leaving his job, we do not think that an employee's fraud claim fails as a matter of law because the employee does not offer evidence of specific instances in which alternative offers of employment were rejected on the strength of the employer's fraudulent promises.⁸

⁸ We think that *Davis v. Sweetheart Plastics, Inc.*, 635 F. Supp. 849 (D. Mass. 1986), does not properly characterize the principle of detrimental reliance. Appellants urge that we apply the *Davis* court's reasoning that detrimental reliance cannot be established where the defendant fails to adduce evidence that "concrete job offers were made or interviews held." *Id.* at 850. The appellants read this case as holding that a plaintiff who remains in his job on account of his employer's false promise of future benefits, without taking any steps to secure alternative employment, is thereby barred from asserting detrimental reliance. This cannot be correct. When an employer wishes to secure an employee's continued service through false promises of benefits, it is his precise intention to deter the employee from seeking alternative employment. To apply the *Davis* court's rationale would be to accept the perverse proposition that only those employees who see through their employers' fraudulent promises of benefits — and therefore take steps to find alternative employment — can ever show detrimental reliance.

Here, as discussed *supra*, the jury could properly have found that Biggins and the defendants entered into an enforceable agreement for the payment of stock compensation. Both employer and employee were therefore subject to a requirement that "parties to contracts, whether experienced in business or not, should deal with each other honestly, and . . . should not be permitted to engage in fraud to induce the contract." *McEvoy Travel Bureau*, 563 N.E.2d at 194 (citations omitted). We think that it would defeat this principle to require as a matter of law that an employee offer proof of missed employment opportunities in a fraud claim against an employer whose very purpose was to secure the employee's forbearance from seeking alternative employment. We thus reject the appellants' contention that Biggins' proof of the element of detrimental reliance fails as a matter of law.

The jury heard evidence that Biggins approached Thomas Hazen in 1984 with a demand for additional compensation that would raise his salary to an annual rate of \$100,000. The jury could have inferred that this demand was an implicit threat by Biggins that he would not otherwise continue in his job. There was further evidence to support the conclusion that as a result of a promise of stock, Biggins remained at the company and referred to his son certain business opportunities that became available to him. A jury could have determined that Biggins, who was fifty-nine years old at the time of the stock agreement, decided as a result of the promise of stock to forego any attempt to seek alternative (or independent) employment during the remainder of his career. The jury could have found damages for this forbearance based on the difference between Biggins' salary and the promised stock compensation that would have raised his annual salary to \$100,000.

Based on this evidence and our reading of Massachusetts law, we conclude that the district court correctly denied the defendants' directed verdict and j.n.o.v. motions.

C. Breach of Contract

Defendants' next attack on the jury's verdict focusses on the sufficiency of the evidence to sustain Biggins' claim that the defendants breached a contract embodied in the Hazen Paper Company's 1980 Employee Handbook. The jury found that either an express or implied employment contract existed between Biggins and the Hazen Paper Company. It also found that the Employee Handbook constituted a part of this contract and that this contract was breached at the time of Biggins' termination. The jury awarded compensatory damages of \$266,897. The district court subsequently denied directed verdict and j.n.o.v. motions that challenged both the sufficiency of the evidence establishing the existence of a contract other than at-will employment and the sufficiency of proof of damages flowing from the breach of that contract.

The parties agree that the controlling authority under Massachusetts law is *Jackson v. Action for Boston Community Development, Inc.*, 403 Mass. 8, 525 N.E.2d 411 (1988). In *Jackson*, the Massachusetts Supreme Judicial Court established that the existence of an express or implied employment contract was a factual issue to be determined under the circumstances of the case, 525 N.E.2d at 413-14, and that, "on proper proof, a personnel manual can be shown to form the basis of [such] an express or implied contract." *Id.* at 414. In *Jackson*, however, the Supreme Judicial Court found summary judgment appropriate against the plaintiff alleging breach of a contract embodied in an employment manual:

In this case. . . . the most that can be said in his behalf is that he received the manual at some unknown time and continued to work for the defendant thereafter

. . . .

[O]n review of all the circumstances here, . . . the conclusion is inexorable that no implied contract based on the personnel manual's terms existed. It is undisputed that the

defendant retained the right to modify unilaterally the personnel manual's terms. This tends to show that any "offer" made by the defendant in distributing the manual was illusory. The personnel manual's language that it is provided for "guidance" as to the defendant's "policies" is of the same import. It is also significant that nothing in the circumstances here reveals any negotiation over the terms of the personnel manual. Furthermore, consistent with employment at will, no term of employment was stated in the personnel manual. The plaintiff does not argue that any special attention was called to the manual by the defendant; there is no indication that the plaintiff signed the manual, or in any way manifested his assent to it or acknowledged that he understood its terms.

Id. at 415-16 (citations omitted). This means, as we understand it, that an employer does not automatically enter into a contract other than at-will employment with its employees by merely distributing a personnel manual to them. Instead, *Jackson* requires that a plaintiff establish all of the elements ordinarily necessary for the formation of a contract in order to prove that a personnel manual forms the basis of an express or implied employment contract.

The evidence showed that Biggins was hired by Hazen Paper in 1977. Biggins testified that at some point thereafter he acquired a copy of the company's 1980 Employee Handbook. Biggins stated that he tried to take a vacation in May of 1986, a month prior to his discharge from the company, but was refused permission by Thomas Hazen. He testified that after his termination the company refused to pay him for other accrued vacation time. Biggins said that he understood that the company had a policy of not paying employees for vacation time off, and that he learned of this policy from the 1980 Employee Handbook. He also declared that he had learned about this policy from a letter sent him after his termination by Hazen Paper's attorney, in which Biggins thought the attorney had quoted "verbatim"

those portions of the Employee Handbook that described Hazen Paper's vacation policy.

The 1980 Employee Handbook established other personnel policies apart from the vacation policy. As part of a section entitled "The Policies You Enjoy as an Employee of Hazen Paper Company," the Handbook specified that employees would have to pass through a ninety day "get-acquainted period" in order to become "regular" employees. In a subsection titled "Job Security," the Handbook provided that

When employees do not fulfill the Company's standards, they are counselled and told how to be an acceptable employee. Only those who jeopardize customer relations through outlandish gross violations of standards or failure to respond to repeated counselling are separated.

On the topic of discipline of employees, the Handbook had a section entitled "What is expected of you as an employee of Hazen Paper Company," which provided that

when discipline becomes necessary because of a violation of Hazen Paper Company's rules, we have the responsibility to ensure that such discipline is fair and consistent. To provide for this treatment, the following factors will be considered:

- 1) The seriousness of the offense;
- 2) The circumstances surrounding the incident;
- 3) Our past record;
- 4) The Company's past practice.

Generally, any discipline will start with a verbal warning, then a more serious penalty of suspension or discharge if the conduct does not change. For very serious matters, employees may be discharged without warning.

These policies, and the surrounding circumstances of Biggins' termination, formed the basis of the jury's finding that (1) the 1980 Employee Handbook established a contract between Hazen Paper and Biggins of other than at-will employment, and (2) that Biggins' termination in 1986 breached the contract embodied in the Handbook because the company failed to follow the procedures specified in the Handbook governing employee counselling and "discipline."

Viewing the evidence in the light most favorable to Biggins, we are nonetheless compelled to hold that the district court erred in denying the defendants' motion for j.n.o.v. After reviewing the various principles of contract formation specifically enumerated by the *Jackson* court as being necessary to establish the existence of a contract other than at-will employment, we find the evidence lacking in two important respects.

First, in affirming a grant of *summary* judgment against an employee, *Jackson* held that it was "significant that nothing in the circumstances here reveal(ed) any negotiation over the terms of the personnel manual." *Jackson*, 525 N.E.2d at 415. In this case, there was no evidence to support a finding that there was "negotiation" between Biggins and Hazen Paper which in any way implied that the 1980 Employee Handbook ever formed a part of Biggins' conditions of employment between 1977 and his termination in June of 1986. Indeed, the evidence showed that the only time the terms of the 1980 Employee Handbook were discussed with Biggins was *after* his discharge from the company. Biggins argues that such "negotiations" took place in the context of the 1984 promise of stock compensation, but offered no evidence at trial that the Employee Handbook was mentioned by him or Thomas Hazen during that meeting.

Second, there was no showing that prior to Biggins' termination that "special attention was called to the manual by the defendant . . . [and] no indication that the plaintiff signed the manual, or in any way manifested his assent to it or acknowledged that he understood its terms." *Jackson*, 525 N.E.2d at 416. In this respect, the fact that the Employee Handbook

relied upon by Biggins was issued by his employer three years after he joined Hazen Paper in 1977 helps explain why Biggins was unable to offer evidence showing that he was called upon to sign the Handbook or otherwise manifest assent to its terms. There was simply no evidence upon which the jury could have made the determination that prior to Biggins' discharge "special attention was called" to him by Hazen Paper about the 1980 Employee Handbook.

The most that can be said here is that after Biggins' termination, Hazen Paper refused to pay him for his accrued vacation time on the basis of language in the Employee Handbook. Biggins, in turn, attempted to hold the defendants to the standards of behavior provided in other portions of that manual. We do not think that under Massachusetts law a jury would be permitted to find that the 1980 Employee Handbook established an implied or express contract of other than at-will employment with Biggins. Consequently, since such an employment contract did not exist at the time of Biggins termination, there could have been no breach.

Even if we concede that Biggins satisfied some of the elements of contract formation required by *Jackson*,⁹ we think that his

⁹ The evidence is inconclusive, at best, to establish some of the other elements required by the *Jackson* court. For example, in rejecting the plaintiff's claim of an implied contract, the Supreme Judicial Court placed particular reliance on the fact that the defendant expressly retained the right to modify unilaterally the personnel manual's terms. *Jackson*, 525 N.E.2d at 415. In the instant case, there was no comparable reservation of rights. Biggins concludes that the absence of a reservation of rights of modification is proof in its favor of an implied contract. The defendants naturally take the opposite view that there "was no evidence that Hazen Paper ever gave up the right to modify its own personnel policies."

The *Jackson* court offered no bright-line standards as to how "clear an indication an employer must give in connection with distributing an employee manual before it may be found that the employer entered into a contract on other than a strictly at-will basis." *Id.* *Jackson* nonetheless places the burden on the employee to prove the existence of the formation of a contract. In this case, there was no express reservation of a right of modification by Hazen Paper. We think that Massachusetts courts would probably not consider the mere fact of the absence of such a reservation adequate evidence to support

failure to adduce evidence to support at least two of the principal elements of that inquiry was fatal to his claim. Under these circumstances, the district court was required to grant j.n.o.v. Where there was no employment contract other than at-will established or implied under the 1980 personnel manual, the jury's award of damages must be vacated.

D. Massachusetts Civil Rights Act

On cross-appeal, Biggins challenges the district court's grant of j.n.o.v. reversing the jury's award of one dollar in compensatory damages for violation of the Massachusetts Civil Rights Act. Mass. Gen. L. ch. 12, § 11H & 11I.¹⁰ To recover under these provisions, a plaintiff must prove that

- (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion."

Bally v. Northeastern Univ., 403 Mass. 713, 532 N.E.2d 49, 51-52 (1989) (quoting Mass. Gen. L. ch. 12, § 11H). Applying

an employee's claim of the formation of a contract other than at-will employment. We also note that we have previously resolved in favor of the employer ambiguities created by the silence of an employment manual on the issue of whether that manual constitutes part of an employment contract. See *Menard*, 848 F.2d at 289-90 (pre-*Jackson* decision under Massachusetts law affirming summary judgment against employee on implied contract claim where there was no evidence showing that personnel manual applied to that employee).

¹⁰ Mass. Gen. L. ch. 12, § 11H provides in pertinent part that

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or . . . commonwealth, the attorney general may bring a civil action. . . .

Mass. Gen. L. ch. 12, § 11I creates a private right of action for persons whose rights have been "interfered with" in the manner proscribed by section 11H.

this test to Biggins' claim, the district court conceded that there might have been an interference with "rights" within the meaning of the Civil Rights Act as a result of the failure of Hazen Paper to deliver the promised stock compensation. The court nonetheless concluded that Biggins had failed to offer adequate evidence to support a claim under the Civil Rights Act because he had not demonstrated that the defendants used *physical* "threats, intimidation or coercion" to accomplish this deprivation.

On appeal, Biggins insists that the district court too narrowly construed the meaning of "threats, intimidation or coercion" when it found Biggins' case distinguishable from "most [Civil Rights Act] cases recognized by the Supreme Judicial Court [which] involve the threat of physical contact." Biggins argues that the district court erred because it required proof of a threat of physical harm.

In *Bally*, the Massachusetts Supreme Judicial Court noted that almost all of the cases in which it had granted relief under the Civil Rights Act involved "a physical confrontation accompanied by a threat of harm." *Id.* at 52. The *Bally* court acknowledged that it thought the sole exception to this requirement of physical confrontation as an element of a Civil Rights Act claim was *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 502 N.E.2d 1375 (1987). There, according to the *Bally* court, in a case involving the deprivation of the plaintiff's contract rights, the Supreme Judicial Court found "that the Boston Symphony orchestra violated (the Civil Rights Act) because its cancellation of its contract with Redgrave had the effect, intended or otherwise, desired or not, of coercing Redgrave not to exercise her First Amendment rights." *Id.* at 52. Biggins asserts that his case is analogous to *Redgrave*, insofar as he too suffered a deprivation of his contractual rights to his stock compensation as a result of the non-physical form of "intimidation" to which he was subjected at the time of his termination from Hazen Paper.

We agree with the district court that j.n.o.v. was appropri-

ate. In the *Redgrave* decision, the Supreme Judicial Court found that a deprivation of Redgrave's contract rights could have been caused by "threats, intimidation and coercion" — specifically, threats to the safety of the audience and members of the Boston Symphony Orchestra made by community members and subscribers after the announcement of Redgrave's planned performance. See *Redgrave*, 502 N.E.2d at 1376-79. The *Redgrave* court found that physical threats by these third parties could have caused the BSO to cancel Redgrave's performance contract, depriving her of both her contract and First Amendment rights. *Id.* The *Redgrave* court thereby inferred the existence of physical "threats, intimidation, or coercion" sufficient to state a claim under the Civil Rights Act.

Biggins did not offer evidence that showed that, as in *Redgrave*, the deprivation of his contract or constitutional rights was caused by indirect physical "threats, intimidation or coercion." We therefore see little reason to deviate from the Supreme Judicial Court's repeated pronouncement that a defendant can be held liable under the Civil Rights Act only in situations that "involve[] an actual or potential physical confrontation accompanied by a threat of harm." *Layne v. Superintendent, Massachusetts Correctional Inst.*, 406 Mass. 156, 546 N.E.2d 166, 168 (1989) (citing *Bally*). See also *Willitts v. Roman Catholic Archbishop*, 411 Mass. 202, 1991 Mass. LEXIS 533, *15-16 (Nov. 18, 1991) ("relief under the Act may be granted where the 'threat, intimidation or coercion' involves. . . a physical confrontation accompanied by a threat of harm. . . .") (citations omitted); *Longval v. Commissioner of Correction*, 404 Mass. 325, 535 N.E.2d 588, 593 (1989) (same principle). If *Redgrave* states an exception to this principle, that exception is not applicable under the facts of this case. We therefore affirm the district court's grant of j.n.o.v.; the jury's one dollar damages award is annulled.

V. PREJUDGMENT INTEREST

The district court awarded prejudgment interest "on the entire award." In *Powers v. Grinnell Corp.*, 915 F.2d 34 (1st Cir. 1990), the role of prejudgment interest was fully explored where liquidated damages had been awarded on an ADEA claim and there had been recovery on state law claims paralleling the ADEA claim.¹¹ We focused on whether the ruling in *Thurston* that liquidated damages under ADEA was punitive, 469 U.S. at 125, should change our circuit rule "that an award of liquidated damages bars prejudgment interest in ADEA cases." *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982). After a detailed examination and analysis of *Thurston* and cases in other circuits, we concluded "that *Thurston* does not ordain abandonment of the majority rule that an award of liquidated damages under the ADEA precludes a recovery of prejudgment interest on the back pay award." *Powers*, 915 F.2d at 41 (citations omitted). We also held, following *Kolb* and *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 8 (1st Cir. 1989), that a plaintiff cannot recover both prejudgment interest on a back pay award under a state law claim and liquidated damages on an ADEA claim. *Powers*, 915 F.2d at 42. We are, of course, bound by the *Powers* holding. Therefore there can be no prejudgment interest on the ADEA damages award.

Although *Powers* would also preclude prejudgment interest on the state law claim of breach of the employment contract, our reversal of the district court's ruling on that claim and annulment of the damages renders this issue moot.

The state law claim based on fraud, however, stands on a different footing. This was not a claim for the back pay and lost employment benefits encompassed within the ADEA count. The fraud count in the complaint was premised on a promise by the defendants that "they would pay him [plaintiff] in addition to his regular salary corporate stock of a value which would increase his annual compensation to \$100,000." The

¹¹ The state law claims were brought under the Rhode Island Fair Employment Practices Act.

jury was instructed properly on each count of the complaint. The only instruction that referred directly to the stock promise was on the fraud count: "The next count is fraud or deceit. Plaintiff also alleges that Defendants committed fraud or deceit by promising to give Plaintiff stock but never delivering the stock." The court then went on to instruct the jury carefully and properly on the proof necessary for a finding of fraud under Massachusetts common law. The jury was further instructed not to award duplicative damages: "In awarding damages, you should be careful not to award duplicative damages; that is, Plaintiff is entitled to collect full compensation for his injuries, but he must not collect more than once for the same wrong."

An analysis of the jury's awards on the fraud and ADEA counts shows that its award for fraud was not duplicative of its award on the ADEA count. The jury awarded plaintiff \$315,000 on the fraud claim. The plaintiff's damages evidence on this count was that the stock loss amounted to \$342,498. The jury award of \$315,000 was a rough approximation of the plaintiff's evidence. On the ADEA count, the jury awarded plaintiff \$560,775. As already pointed out, this was \$141,320.62 more than the plaintiff's losses in salary, employment benefits and bonuses. It is, however, a far cry from the stock loss of \$342,000.

We see no reason why prejudgment interest should not be allowed on a state law claim that is, as here, separate and distinct from the ADEA claim. This was well within the district court's discretion. See *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1343 (1st Cir. 1988). This result also comports with our decision in *Freeman* in other respects. There, we observed that "a plaintiff is entitled to only one full recovery, no matter how many legal grounds may support the verdict," *id.* at 1345, and that the "plaintiff, although entitled to the same damages under both federal and state statutes, could collect them but once." *Id.* at 1344, n.7. See also *Linn*, 874 F.2d at 8. Here, the plaintiff has recovered the value of the stock promised him under his common law fraud claim, and not under his ADEA claim. There is, therefore, no duplication of damages.

We now turn to the ERISA damages award. We have been unable to find any cases discussing whether or how an award of liquidated damages under an ADEA claim affects the addition of prejudgment interest to ERISA damages. We do know, however, that "[a]s a matter of federal law, prejudgment interest is a discretionary item of compensation." *Conway v. Electro Switch Corp.*, 825 F.2d 593, 602 (1st Cir. 1987). See also *Kolb*, 694 F.2d at 875.

In *West Virginia v. United States*, 479 U.S. 305 (1987), the question was whether West Virginia was liable for prejudgment interest on a debt owed the United States Army Corps of Engineers. *Id.* at 306. A unanimous court found that it was. In the course of its opinion, the Court stated: "Prejudgment interest is an element of complete compensation . . ." *Id.* at 310 (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-656, & n.10 (1983)). The Seventh Circuit has taken the position that prejudgment interest should be presumptively available to victims of federal law violations and that this presumption is specifically applicable to ERISA cases. See *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991). We need not go that far at this time. The question is whether the prejudgment interest award was within the discretion of the district court. We find that it was.

As with the state law fraud claim, the ERISA award did not duplicate the ADEA award. It was not based on loss of back pay and other employment benefits due and owing at the time plaintiff was discharged. In awarding damages on the ERISA count, the jury found that "defendants fired plaintiff for the purpose of preventing plaintiff from attaining vestment of pension benefits, in violation of ERISA." We have already found that the jury verdict on this count had a solid evidentiary foundation. Defendants argue that because the pension rights would not be payable until 1994, prejudgment interest cannot be awarded. This overlooks the obvious fact that the plaintiff has been damaged now because defendants took away pension

benefits by firing him before his rights to the pension could vest. We affirm the award of prejudgment interest on the ERISA damages.

VI. ATTORNEY'S FEES

After trial, Biggins moved that he be awarded attorney's fees under the ADEA count, the ERISA count, and the Massachusetts Civil Rights Act count in the amount of \$666,729.12. This amount represented one-third of the total jury verdict of \$2,000,187.35. In its memorandum opinion and order on the post-trial motion, the district court reduced the ADEA award by one-half and found, as a matter of law, that plaintiff was not entitled to liquidated damages. It seems apparent that, regardless of the numbers, plaintiff sought an enhancement of attorney's fees equal to one-third of the final judgment on damages. This is borne out by an affidavit of plaintiff's counsel submitted in support of its motion for attorney's fees.

This affidavit stated, *inter alia*, that the case was handled on a one-third contingent fee basis with the plaintiff responsible for the expenses incurred; and that in the legal market for the geographic area in which plaintiff's counsel practices — Springfield, Massachusetts — a one-third contingent fee agreement is the typical method of compensation for attorneys representing plaintiffs on employment-related litigation.¹² The chief counsel for the plaintiff stated:

I agreed to accept this case on a contingent fee basis, even with the knowledge that this would be a long and complicated case, because I knew this was the only way to provide access to the Courts for Mr. Biggins, and because our risk taking had the potential for reward if successful with a premium in excess of our normal hourly rates. If the

¹² There were affidavits by two other attorneys from the same legal market area to the same effect.

Court's award of attorneys' fees is limited to payment for hours expended multiplied by our normal hourly rates, then I would be discouraged from taking these types of cases in the future when I could be spending my time on cases where I would be paid without risk of non-payment according to my normal hourly rate.

Plaintiff's counsel also submitted detailed records of the time spent by the attorneys and paralegals on the case and a fee computation based on this and the hourly rates charged by the different attorneys who worked on the case. The total legal fees, as determined by the time expended multiplied by hourly rates, came to \$182,058.25. The district court adjusted this fee slightly to reduce the hourly payment rates on work performed by experienced attorneys on "non-core" matters. The court arrived at a lodestar fee in the amount of \$175,564.57. Biggins does not appeal the court's determination of the lodestar fee award.

The district court refused, however, to enhance the lodestar fee award to an amount equivalent to one-third of the total damages awarded. Plaintiff appeals the refusal of his request for enhancement of the fee award.

The issue of enhancement of legal fees to reflect the contingency of services -- the risk involved of not getting paid -- was the focus of the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). In a comment that is pertinent to the case before us, Justice White, writing for a plurality, observed that fee enhancement is not necessary "where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes." *Id.* at 726. Justice White then stated:

The issue thus involves damages cases that lawyers would not take, not because they are too risky (the fee-shifting statutes should not encourage such suits to be brought), but because the damages likely to be recovered

are not sufficient to provide adequate compensation to counsel, as well as those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages. In both situations, the fee-shifting statutes guarantee reasonable payment for the time and effort expended if the case is won.

Id.

It appears to us that in this case fee enhancement is not warranted. Although the fee contract between plaintiff and his attorneys is not part of the record, it can be fairly inferred from counsel's affidavit that Biggins and his attorneys entered into a fee agreement whereby Biggins agreed to pay his attorneys one-third of the amount of damages awarded and be responsible for expenses. In his affidavit, chief counsel for Biggins stated that "our risk taking had the potential for reward if successful with a premium in excess of our normal hourly rates." On the basis of the adjustment in damages made in this opinion, and without adding prejudgment interest, plaintiff's attorneys are entitled to fees under their contingent fee arrangement of more than twice the amount of the lodestar fee award. Plaintiff's counsel, as he anticipated, will in fact be rewarded with a premium in excess of his normal hourly rates.

The substantial recovery of damages in this case stands in contrast to the situation in a majority of civil rights cases in which the damages are so low that fees based on a contingent fee agreement are less than the lodestar recoverable as attorney's fees. In *Blanchard v. Bergeron*, 489 U.S. 87 (1989), the damages award on a § 1983 claim totalled \$10,000. The attorneys had a forty percent contingency fee agreement with the plaintiff. The lodestar figure, as determined by the district court, was \$7,500. The court of appeals set the fee award aside on the ground that the contingent fee agreement was a cap on the fees to be awarded. Justice White, writing for the Court, reversed this ruling, holding that "[t]he attorney's fee provided for in a contingent-fee agreement is not a ceiling upon the fees

recoverable under section 1988." *Id.* at 96. *Blanchard*, which is typical of the fee cases coming before the courts, is the reverse of the case before us. Under the circumstances of this case, fee enhancement is not necessary because the contingency arrangement more than adequately compensates Biggins' attorneys for the risk undertaken in accepting this case.

This does not mean that a lodestar fee should not be determined. The lodestar fee, which is paid by the defendant, acts as a deterrent to future violations of the ADEA. As the *Blanchard* Court pointed out, "[t]he defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way." *Id.* at 944. We would expect, of course, that the lodestar fee as determined by the district court will be an offset against the fee to be paid by the plaintiff under the one-third contingent fee agreement.

CONCLUSION

1. We uphold the finding of liability on the ADEA count. We find, as a matter of law, that the violation was willful. The damages are reduced from \$560,775 to \$419,454.38. Because this was a willful violation that amount is doubled to \$838,908.76.
2. We uphold the finding of liability on the ERISA count. We order a remittitur of \$7,000 on the damages award of \$100,000.
3. We uphold the finding of liability on the wrongful discharge count. We leave undisturbed the award of one dollar in damages.
4. We uphold the finding of liability on the fraud count and affirm the damages award of \$315,098.
5. We reverse the finding of liability on the breach of employment contract count. The damages award on that count of \$266,897 is annulled.

6. We affirm the district court's grant of j.n.o.v. on the Massachusetts Civil Rights Act count. This means the jury award of one dollar in damages is annulled.
7. No prejudgment interest can be awarded on the ADEA count. We uphold the awards of prejudgment interest on the ERISA count and the wrongful discharge and fraud counts.
8. We affirm the district court's refusal to enhance plaintiff's attorney's fees.

Affirmed in part, reversed in part. Remanded for further proceedings consistent herewith.

No costs to either party.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0025-F

WALTER F. BIGGINS,

PLAINTIFF,

v.

THE HAZEN PAPER COMPANY,

ROBERT HAZEN AND

THOMAS HAZEN,

DEFENDANTS.

MEMORANDUM AND ORDER

April 5, 1991

FREEDMAN, C.J.

I. INTRODUCTION

On February 16, 1986, plaintiff Walter P. Biggins commenced this action against defendants Hazen Paper Company, Robert Hazen and Thomas Hazen ("defendants" or "the Hazens"), alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), Massachusetts tort and contract law, and the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). A jury found in favor of plaintiff on six of the eight counts in his complaint, and awarded plaintiff substantial damages. After the verdict, both parties submitted post-trial motions.

Four motions, two by plaintiff and two by defendants, are now before the Court. First, defendants have filed a

motion, pursuant to Fed. R. Civ. P. 50(b), for judgment notwithstanding the verdict or, in the alternative, for a new trial. Second, defendants have filed a motion to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff opposes these motions.

Third, plaintiff has moved for an award of costs and attorney's fees under provisions of federal and state law. Fourth, plaintiff has filed a motion to compel defendants to increase the amount of the bond that secures plaintiff's judgment during the pendency of the post-trial motions. Defendants oppose plaintiff's motions.

For the reasons stated below, the Court orders judgment notwithstanding the verdict with regard to liquidated damages and the MCRA claim. The Court denies defendants' motion for judgment notwithstanding the verdict or new trial in all other respects. The Court also denies defendants' motion to alter or amend the judgment. The Court grants plaintiff's motion for attorneys' fees in the amount of \$175,564.75, and for costs in the amount of \$9,760.07. Finally, the Court denies plaintiff's motion to increase the amount of the bond.

II. PRIOR PROCEEDINGS

On July 20, 1990, after one week of trial, a jury of six returned a verdict in favor of plaintiff on six of the eight counts at issue.¹ On Count I, the jury awarded plaintiff \$560,775.00 in actual damages under the ADEA, and also found that defendants had wilfully violated the ADEA. On Count II, the jury found that defendants' conduct constituted a violation of ERISA, and awarded \$100,000.00 in damages. The jury also awarded plaintiff \$1.00 in damages on Count IV for wrongful discharge, \$315,098.00 on Count V for fraud, \$1.00 on Count VII for a

¹ The jury found in favor of defendants on Counts III (declaratory judgment) and VI (conversion). Because none of the parties have objected to these parts of the verdict, Counts III and VI are not at issue, and the Court will not discuss them.

violation of MCRA, and \$266,897.00 on Count VIII for breach of contract. Thus, the jury awarded plaintiff a total of \$1,242,772.00.

Subsequent to the verdict, plaintiff filed a motion for an award of liquidated damages. On August 24, 1990, the Court granted plaintiff's motion, based solely on the jury's finding of willfulness and the text of the ADEA. 29 U.S.C. § 626(b); *Biggins v. Hazen Paper Co., et al*, Civ. Action No. 88-0025-F, Memorandum and Order (August 24, 1990). Thus, the Court awarded to plaintiff, in addition to the damages awarded by the jury, liquidated damages in an amount equal to the actual damages awarded by the jury on the ADEA claim, that is, \$560,775.00. The Court deliberately offered no opinion as to the weight or sufficiency of the evidence with regard to any of the jury's findings. "[T]he Court will withhold its decision as to sufficiency of the evidence, on the question of willfulness as well as on other portions of the verdict, until after judgment is entered." *Id.* at 3-4.

The Court ordered the clerk to enter judgment consistent with the jury verdict and the Court's decision on the liquidated damages question. *Id.* at 4. On August 27, 1990, the clerk entered judgment in the amount of \$1,803,547.00, with interest on the ERISA and state law claims in the sum of \$196,641.35. Defendants' total liability as of the date of judgment, therefore, was \$2,000,188.35.

The Court ordered the clerk to issue an execution on November 7, 1990. Upon issuance of the execution, defendants filed a bond in the amount of \$2,100,000.00 to stay execution of judgment pending the Court's disposition of post-trial motions. Defendants having provided security, plaintiff has refrained from execution pending the Court's determination of the pending motions.

III. DISCUSSION

A. Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial

Defendants seek judgment notwithstanding the verdict, or in the alternative, a new trial on each count on which plaintiff prevailed. Fed. R. Civ. P. 50(b). The Court will first address defendants' arguments for judgment notwithstanding the verdict, and then proceed to the new trial arguments.

1. Judgment Notwithstanding the Verdict

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict . . . or by judgment notwithstanding the verdict." *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-80 (1943). The Court will grant a party's motion for judgment notwithstanding the verdict only if, viewing evidence and reasonable inferences in a light most favorable to the non-moving party, reasonable people would nonetheless find in the movant's favor. *Jordan v. United States Lines, Inc.*, 738 F.2d 48; 49 (1st Cir. 1984)(citations omitted); *accord deMars v. Equitable Life Assurance Society*, 610 F.2d 55, 57 (1st Cir. 1979). "This Court will not grant a judgment notwithstanding the verdict unless the jury's verdict is untenable under any reasonable assessment of the evidence adduced at trial." *Refuse & Environmental Systems, Inc. v. Industrial Services of America*, 732 F. Supp. 1209, 1222 (D. Mass. 1990)(Freedman, C.J.).

a. Count I: Age Discrimination in Employment

In order to prevail under the ADEA, a plaintiff must prove that his employer fired him because of his age, that is, that plaintiff's age was "the determinative factor in his discharge." *Freeman v. Package Machinery Co.*, 865 F.2d 1331; 1335 (1st Cir. 1988); *Loeb v. Textron, Inc.*, 600 F.2d 1003; 1019 (1st Cir.

1979). To properly state a claim under the ADEA, a plaintiff must first establish a *prima facie* case of age discrimination. A plaintiff must show that he was within the protected age group; that he was fired; that he was qualified for the position and performed his job adequately; and that he was replaced by a person with qualifications similar to his own, thus evidencing the employer's continued need for the same skills. *Hebert v. Mohawk Rubber Co.*, 872 P.2d 1104, 1110 (1st Cir. 1989); *Freeman*, 865 F.2d at 1335.

Proof of plaintiff's *prima facie* case creates an inference of age discrimination, and places on the employer a burden of articulation or production. While the burden of proof remains at all times with the plaintiff, the employer, having been presented with an inference of discrimination, bears the burden of articulating a valid, non-discriminatory reason for the firing. *Freeman*, 848 F.2d at 1335.

If the employer produces a legitimate reason for the firing, "the initial presumption of age discrimination is dissolved and plaintiff must respond by showing that the reasons presented by the defendant are merely pretextual." *Hebert*, 872 F.2d at 1111; *Freeman*, 865 F.2d at 1336. Plaintiff must "prove by a preponderance of the evidence that the defendant's true motive was age discrimination." *Menard v. First Security Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1988). Thus, in the end, a plaintiff must prove that the employer's alleged reasons for discharging plaintiff were fictitious and designed merely to mask age discrimination. *Freeman*, 865 F.2d at 1336.

The record plainly indicates that plaintiff established a *prima facie* case, and defendants do not appear to dispute this. Rather, the Hazens contend that they fired plaintiff because of plaintiff's disloyalty and his refusal to sign a legitimate confidentiality agreement. Defendants point to plaintiff's involvement with other businesses competing in the paper industry as evidence of plaintiff's disloyalty. In short, defendants argue that they had a valid, non-discriminatory reason for discharging plaintiff, that the record contains overwhelming evidence

in their favor, and that the jury verdict to the contrary lacks evidentiary support. The Court disagrees, and now holds that plaintiff offered evidence sufficient to sustain his burden of proof under the ADEA. Thus, the jury verdict as to age discrimination must stand.

Plaintiff offered the following as evidence of age discrimination. Plaintiff testified that defendants presented him with a confidentiality agreement, and that plaintiff would have had to sign the agreement in order to keep his job. Trial Transcript, Volume I at 114.² Plaintiff alleged that other, younger Hazen Paper employees did not have to sign such an agreement. Plaintiff further testified that the agreement did not provide for severance pay for plaintiff. However, when defendants hired a younger employee, one McDonald, to replace plaintiff, Mr. McDonald was offered a confidentiality agreement that provided for 100 days of separation pay. Further, Mr. McDonald's confidentiality agreement included a six-month noncompetition clause, whereas plaintiff's agreement contained a two-year non-competition clause. 4 Tr. 92 (testimony of Thomas Hazen).

Plaintiff also offered evidence that defendants fired plaintiff in order to prevent plaintiff from acquiring any pension entitlements. While the discharge of an employee in order to eliminate the employee's pension rights cannot, by itself, establish age discrimination, courts have held that such conduct provides some proof of an ADEA violation. *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1990); *Benjamin v. United Merchants and Manufacturers, Inc.*, 873 F.2d 41, 43 (2d Cir. 1989). It is undisputed that a Hazen Paper employee acquires vested rights to pension benefits after having worked for Hazen for ten years. Plaintiff testified that at the time of his discharge, he "was just a few hours away from being fully vested" in the pension plans offered by Hazen Paper Company. 1 Tr. 128. Thomas Hazen was in charge of pension account matters

² The trial transcript comes in six volumes. The Court will cite the trial transcript by volume number and page. For example, the Court would cite to page 25 of volume 2 as follows: 2 Tr. 25.

at Hazen Paper Company, and regularly received pension account documents regarding individual employee pension status. 4 Tr. 94-95. Thomas Hazen testified that at the time of plaintiff's termination, plaintiff had nine years and several months of service at Hazen Paper Company. 4 Tr. 97-98. While Thomas Hazen denied discharging plaintiff to prevent his pension rights from vesting, the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights.

Plaintiff testified that the Hazens also made comments with regard to plaintiff's age. On the first day of trial, plaintiff testified that Thomas Hazen had stated that "it was costing him a lot more for my [insurance] policy because I was so old." 1 Tr. 151. According to plaintiff, Robert Hazen had also mentioned that the Hazen's handball court membership would not be useful for plaintiff because of plaintiff's age. 1 Tr. 151.

The jury also heard evidence regarding defendants' offer of a consulting arrangement to plaintiff. Thomas Hazen testified that in May of 1986, before plaintiff was fired, he offered plaintiff a consulting contract. Thomas Hazen testified that persons employed by Hazen Paper as consultants did not accrue employee benefits: no vacation benefits, pension rights, or health or disability insurance. 4 Tr. 106-107. From this testimony, the jury could reasonably have concluded that defendants sought to receive plaintiff's services, but did not wish to extend to plaintiff certain benefits that were offered to younger employees.

While the Court finds this evidence of age discrimination a bit thin, the evidence is sufficient to support the jury's verdict. A judge may not grant judgment notwithstanding the verdict simply because he would have reached a different conclusion had he been the trier of fact. *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). Rather, judgment notwithstanding the verdict is appropriate only where the evidence can reasonably lead to only one conclusion. Because the Court finds that the jury could have reasonably found age discrimination,

based on the evidence adduced at trial and reasonable inferences drawn therefrom, the verdict as to age discrimination will stand.

b. Liquidated Damages: The Question of Willfulness

On the issue of willfulness, however, the Court finds the evidence deficient. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the Supreme Court, adopting a Second Circuit definition, held that a violation of ADEA is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126, citing *Air Line Pilots Ass'n, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part and rev'd in part*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).³ In adopting the "knew or showed reckless disregard" standard, the Supreme Court explicitly rejected the notion that a willful violation exists where "the employer simply knew of the potential applicability of the ADEA," *Thurston*, 469 U.S. at 127, or where the employer merely knew that the ADEA was "in the picture." *Id.*, citing *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert.*

³ Prior to *Thurston*, the First Circuit in *Loeb* held that a violation of the ADEA is willful if "done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." 600 F.2d at 1020, n. 27, quoting E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Thurston*, however, the Supreme Court adopted the "knew or showed reckless disregard" standard for willfulness in ADEA cases. The Supreme Court further stated that "[w]e do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020, n. 27 (1st Cir. 1979)." *Thurston*, 469 U.S. at 126 n. 19.

While the First Circuit has not expressly overturned *Loeb* with respect to the standard for determining willfulness, the First Circuit has applied *Thurston*, without reference to *Loeb*, when deciding the question of willfulness under the ADEA. *Aledo-Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 357 (1st Cir. 1989). Thus, the Court finds that the language of *Thurston* operates to overrule *Loeb* with respect to the standard of willfulness that applies in ADEA cases.

denied, 409 U.S. 948 (1972). The Supreme Court rejected these proposed standards because they "would result in an award of double damages in almost every case." *Thurston*, 469 U.S. at 128. "Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) [29 U.S.C. § 626(b)] in a manner that frustrates this intent." *Id.*

It is with some difficulty that the Court applies the "knew or showed reckless disregard" standard to the facts of the instant case. In *Thurston*, Trans World Airlines ("TWA") adopted a policy which allowed airplane captains who were disqualified from serving as captains for reasons not related to age (e.g., medical incapacity) to transfer to positions as flight engineers. However, those captains over the age of sixty could not automatically transfer. Any captain aged sixty years or more could transfer to flight engineer status only if he successfully bid for flight engineer status pursuant to a collective bargaining agreement. The Supreme Court held that the policy discriminated against protected pilots in violation of the ADEA. However, the Court held that the violation was not willful because TWA made good faith efforts to fashion a policy in compliance with the ADEA.

In cases like *Thurston*, which involve employment policies or employment plans, the "knew or showed reckless disregard" standard functions adequately because it penalizes employers who institute discriminatory policies that they know violate that ADEA, or that indicate the employer's reckless disregard for the provisions of the ADEA. Indeed, the "knew or showed reckless disregard standard" guarantees that liquidated damages serve their proper punitive function, different from the pure compensatory role of actual damages. *Thurston*, 469 U.S. at 125.

Unlike *Thurston*, the case at hand involves a claim of discrete employment discrimination. Plaintiff alleged discriminatory treatment against him as an individual based on his age,

without reference to any employment policy. To prevail on his ADEA claim, plaintiff had to prove, and did prove, that "but-for" defendants' motive to discriminate against him because of age, he would not have been discharged." *Loeb*, 600 F.2d at 1019. Having so proven, a wooden application of the "knew or showed reckless disregard" standard would not properly distinguish between simple and willful ADEA violations, because plaintiff, in establishing the actual ADEA violation, already had to prove that age discrimination motivated the employer to fire plaintiff. *Menard*, 848 F.2d at 285. The "knew or showed reckless disregard" standard, applied without reference to the two-tiered liability scheme, would therefore result in liquidated damages in practically every case of discrete employment discrimination, despite the Supreme Court's rejection of such a result.

Courts from other circuits have found it necessary to distinguish between simple and willful age discrimination, in an effort to insure that liquidated damages awards do not become automatic. *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 346 (3rd Cir. 1990); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340-41 (8th Cir. 1989); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 635-36 (10th Cir. 1988). In *Neufeld*, *supra*, for example, the court decided that there must be "direct evidence — more than just an inference from, say, an arguably pretextual justification—of age-based animus" to warrant an award of liquidated damages. *Neufeld*, 884 F.2d at 340.

To date, the First Circuit has offered no guidance on this point. Thus, while the Court will apply the "knew or showed reckless disregard" standard in accordance with controlling precedent, it will not apply that standard in a manner that would frustrate congressional intent or Supreme Court interpretations. Upon consideration of *Neufeld* and similar authorities, the Court now holds that plaintiff, in order to

recover liquidated damages, must prove that the employer engaged in specific age-based conduct that rises above an ordinary ADEA violation. Inferential evidence of discrimination is not enough to establish willfulness. Mere proof of an ADEA violation, without more, does not adequately distinguish between ordinary and willful violations of the ADEA. There must be proof sufficient to push the level of conduct to a higher plateau. Having so stated the law, the Court now decides that the jury's finding of willfulness must be set aside for the following reasons.

The evidence in this case, if examined in relation to ADEA cases considered by courts of appeals in other circuits, is simply not adequate to warrant a finding of willfulness. In *Reynolds v. CLP Corporation*, 812 F.2d 671 (11th Cir. 1987), the plaintiff was demoted and then fired from her position as store manager after fifteen years of service. The plaintiff alleged "that CLP engaged in a systematic campaign of harassment and humiliation in an effort to force [plaintiff] to resign." *Id.* at 673. The evidence showed that the employer expressly sought "new" and "young Miss America type" employees. *Id.* The case also included evidence that less than six months before her discharge, the employer demoted plaintiff, cut her pay by \$10,000.00, placed her under the supervision of a store manager who "had ways of getting rid of CLP's unwanted employees," *id.*, fired her, and replaced her with a woman in her twenties. The court of appeals upheld the jury's award of liquidated damages.

In *Neufeld, supra*, the employer fired plaintiff, age 52, after seventeen years of service in the Kansas City sales district. The employer replaced plaintiff with a twenty-seven year old sales agent. *Neufeld*, 884 F.2d at 337. Testimony of a non-party employee indicated that plaintiff's supervisor from Kansas City, Ed Kill, tried to emulate other sales districts. "Kill said that the Indianapolis district manager had 'gotten rid of the older people . . . [and] had hired younger people,' and that 'this is what [Kill] was trying to do with [the Kansas City] district.'" *Id.* at 338, citing district court transcript at 336. The testimony showed that Mr. Kill found Mr. Neufeld to be the appropriate

"sacrificial lamb." *Id.* at 338. Mr. Neufeld was the oldest sales agent in the district, and the evidence clearly supported the jury's finding that Mr. Kill fired Mr. Neufeld because of his age. According to one witness, "Kill commented that 'one way of looking at it, you get rid of the old guys, put in the new people, the figures change.'" *Id.* at 338, citing district court transcript at 764. Again, the court of appeals upheld a jury's finding of willfulness.

The *Reynolds* and *Neufeld* cases contain strong evidence of age-based discrimination by the employer. In these cases, the employer demoted the older employee, or cut the employee's pay, or made disparaging statements directed at the employee's age, or otherwise by conduct or statements established a plain nexus between the discharge and the employee's age. In comparison, the instant case, while containing the few strands of age-based evidence summarized above, lacks powerful evidence of age-based animus.

The instant case closely resembles cases such as *Smith v. Consolidated Mutual Water Co.*, 787 F.2d 1441 (10th Cir. 1986), where the Tenth Circuit Court of Appeals found no willful ADEA violation. In *Smith*, the plaintiff's supervisor often referred to plaintiff as "an old goat," criticized him for being slow, commented that he had been "knocked around a bit over the years," and fired him in favor of a younger worker. *Smith*, 787 F.2d at 1442. The Court held that "[a]lthough the evidence is thin and circumstantial, we conclude that, taken as a whole, it is enough to permit a reasonable juror to infer that age was a determinative factor in Consolidated's decision." *Id.* While the court of appeals found that plaintiff had adequately proven an ADEA violation, the court held that "[t]he thin nature of the evidence presented by Mr. Smith at trial compels us to agree with the trial court that Consolidated's conduct was not 'willful' under the standard announced by the Supreme Court in *Trans World Airlines, Inc. v. Thurston, supra*." *Id.* at 1443.

The Court has also considered *Morgan v. Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990). In *Morgan*, numerous Gazette

employees testified regarding the age-based employment decisions allegedly made by a particular Gazette manager, one Tinker. The record indicated "a pattern of employees over the age of forty leaving the circulation department and being replaced by younger employees. . . ." *Morgan*, 897 F.2d at 950. Testimony demonstrated age-based hiring, payment and firing practices by Mr. Tinker. The record contained evidence that Mr. Tinker referred to an older employee as an "old fuddy-duddy," and that "no matter what he did, [Morgan] would be fired because Tinker was out to get all the older, experienced employees." *Id.* As in *Smith*, the court of appeals found the evidence sufficient to support a finding of liability, but inadequate under *Thurston* to trigger liquidated damages. See also *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990) (even though jury finds that employer discharged plaintiff in violation of ERISA, court of appeals finds evidence insufficient to support a finding of willfulness); *Gillian v. Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987) (in affirming judgment notwithstanding the verdict on the question of liquidated damages, the court of appeals finds the evidence "too thin" to support of [sic] finding of willfulness).

In the instant case, as in *Smith* and *Morgan*, the evidence was largely circumstantial. Indeed, Mr. Biggins' testimony supplied almost all of the evidence of age discrimination offered in the case. While "[a] claim of discrimination need not be proven solely through direct evidence," *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987), the Court will not allow liquidated damages if based on sparse or circumstantial evidence, or on self-serving testimony. Having considered the evidence as a whole and as summarized above, the Court finds the evidence incapable of supporting a finding of willfulness.

c. Count II: ERISA

In Count II of the complaint, plaintiff alleges that defendants fired him in order to prevent his attainment of pension rights, in violation of section 510 of ERISA, 29 U.S.C. §1140. The jury

found in plaintiff's favor on Count II, and awarded plaintiff \$100,000.00 in damages.

Section 510 provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee pension plan] . . ." Congress designed section 510 to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). To recover under section 510, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (citations omitted). However, proof that an employee lost pension benefits as a mere consequence of discharge will not create a cause of action under ERISA. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987); *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983). Plaintiff must demonstrate that the employer fired him with the "unlawful purpose" to prevent plaintiff from attaining pension rights. *Dister*, 859 F.2d at 1111 (collecting cases).

Plaintiff offered ample evidence of an ERISA violation, and the jury verdict on Count II must therefore stand. Plaintiff testified that at the time of his discharge, he had almost ten years of service at Hazen Paper Company. 1 Tr. 128.⁴ Thomas Hazen offered similar testimony. 4 Tr. 97-98. Thomas Hazen also testified that he was in charge of pension account matters at Hazen

⁴ After the conclusion of discovery, plaintiff's counsel found that plaintiff may in fact have attained the right to collect pension benefits before defendants fired him. Plaintiff offered into evidence, as exhibit 26, the summary plan description of defendants' pension plan. 4 Tr. 97. The summary plan description provides that "if the aggregate of years and months of service exceeds five, then an additional year will be added in determining your vested percentage." 4 Tr. 97 (testimony of Thomas Hazen). If this provision applied to plaintiff, then plaintiff would have had more than ten years of service for pension purposes.

Paper Company, and regularly received pension account statements regarding individual employee pension status. 4 Tr.94-95. This evidence, in combination with evidence of the proffered consulting position, supports the inference that defendants fired plaintiff with the intent to deprive him of earned pension benefits. Because the jury could reasonably have drawn such an inference from the evidence, the Court will not set aside the verdict with regard to the ERISA claim.

d. Count IV: Wrongful Discharge

On Count IV, the jury returned a verdict in plaintiff's favor, and awarded one dollar in damages.

The general rule in Massachusetts is that an at-will employee-like plaintiff may be terminated with or without cause. *Glaz v. Ralston Purina Co.*, 24 Mass. App. Ct. 386, 389, 509 N.E.2d 297, 299, *rev. denied*, 400 Mass. 1106, 513 N.E.2d 1289 (1987). Exceptions to the general rule exist, however. For example, an employee has a cause of action for wrongful discharge if the discharge is in bad faith or contrary to public policy. *DeRose v. Putnam Management Co., Inc.*, 398 Mass. 205, 210, 496 N.E.2d 428, 431 (1986); *Siles v. Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, *rev. denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

Defendants argue that "[p]laintiff's recovery for wrongful discharge . . . depends upon the enforceability of the stock promise and whether plaintiff ever was lawful owner of the water based acrylic formula." Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 12 (October 23, 1990) ("Defendants' JNOV Reply"). Defendants contend that "[p]laintiff's claim has always been that selling the rights to 'his process or formula' was consideration for Hazen stock." Defendants' Brief in Support of Motion for Judgment Notwithstanding the Verdict at 11 (September 11, 1990) ("Defendants' Brief for JNOV"). Because the jury found that plaintiff never owned the paper treatment formula in question, defendants argue, any alleged

stock-for-formula agreement lacks consideration, and is unenforceable. Thus, defendants contend that they cannot be liable for wrongful discharge, because the firing of plaintiff did not prevent plaintiff from receiving a benefit to which he was entitled.

The Court finds defendants' argument unpersuasive because it does not properly characterize plaintiff's wrongful discharge claim. It is true that the jury found that plaintiff had no ownership rights to the formula. *See* Special Verdict at 3 (July 20, 1990). However, while plaintiff does claim that defendants agreed to compensate him with stock in return for use of the formula, plaintiff also contends that defendants promised the stock as compensation for services rendered. No party disputes that plaintiff repeatedly sought greater compensation for his work at Hazen Paper Company; the disagreement centers around what defendants did to accommodate plaintiff's demand.

Plaintiff's version is that defendants agreed that plaintiff deserved a \$100,000.00 salary for the work he performed for defendants, 1 Tr. 97, and that defendants agreed to pay plaintiff "the difference between my salary and \$100,000.00 in stock." 1 Tr. 98. Plaintiff testified that when reminded by plaintiff of the stock promises, Thomas Hazen never denied that he promised plaintiff stock compensation, 1 Tr. 105, 125, but that defendants nevertheless failed to tender the stock as promised. *Id.* Plaintiff further testified that he agreed to sign over to defendants any rights he had to the paper treatment formula in return for fulfillment of the stock promises. 1 Tr. 98-99. Finally, after plaintiff refused to sign the confidentiality agreement, defendants fired plaintiff in order to avoid honoring their stock promise. 1 Tr. 126-27.

Given this evidence, the Court finds ample consideration for the stock promise alleged by plaintiff. The agreement called for increased compensation for plaintiff, in the form of salary or its equivalent. The consideration for the stock promise was the present and continued satisfactory performance of services for

Hazen Paper Company. Thus, while the jury's verdict with regard to the ownership of the formula does reject the notion that plaintiff had any ownership right to the formula, it does not entirely destroy consideration for the stock promise.

The evidence also suffices to support the verdict for wrongful discharge. As noted above, plaintiff in this case testified — and the jury found — that defendants promised plaintiff stock, as a substitute for salary, equal in value to the difference between plaintiff's salary and \$100,000.00. Plaintiff also testified that while the Hazens never denied promising the stock, they never delivered on the promise, and fired plaintiff in order to avoid rendering the promised compensation. Therefore the Court will not disturb the jury's verdict on Count IV.

e. Count V: Fraud

In Count V, plaintiff alleged that defendants fraudulently failed to honor their promise to compensate plaintiff with stock. The jury found in plaintiff's favor, and awarded plaintiff \$315,098.00 in damages for fraud.

"[A] fraud may be defined to be any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty."

Commonwealth v. O'Brien, 305 Mass. 393, 397-398, 26 N.E.2d 235, 238 (1940), quoting *Commonwealth v. Tuckerman*, 76 Mass. (10 Gray) 173, 203 (1857). An action in fraud requires plaintiff to prove "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." *Barrett Associates, Inc. v. Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867, 868 (1963), quoting *Kilroy v. Bar-*

ron, 326 Mass. 464, 465, 95 N.E.2d 190, 191 (1950). Because the evidence adduced at trial amply satisfies these elements, the jury verdict for fraud will stand.

In essence, defendants' attack on the jury's fraud verdict comes in two parts. First, defendants argue that plaintiff failed to prove detrimental reliance on defendants' misrepresentation. Second, defendants assert that plaintiff never established damages directly resulting from defendants' misrepresentation. The Court will discuss each contention in turn.

A plaintiff must prove more than mere deception to establish a cause of action for fraud. Massachusetts case law requires that a plaintiff show detrimental reliance in order to collect for fraud. *Nei v. Burley*, 388 Mass. 307, 311, 446 N.E.2d 674, 677 (1983); *Kilroy*, 326 Mass. at 465, 95 N.E.2d at 191. Courts will find detrimental reliance where the misrepresentation "materially influenced" the plaintiff, in whole or in part, to take action or refrain from acting. *National Shawmut Bank v. Johnson*, 317 Mass. 485, 490, 58 N.E.2d 849, 852; *Schinkel v. Maxi-Holding, Inc.*, 30 Mass App. Ct. 41, 48, 565 N.E.2d 1219, 1224 (1991)(plaintiff adequately states a claim for fraud where, although plaintiff rendered managerial services and partial payments in reliance on defendants' promise to tender company stock, defendants refused to deliver stock as promised).

Massachusetts law further provides that in a fraud action, the misrepresentation need not be the sole or predominating motive that induced the victim to engage in particular conduct. *National Shawmut Bank*, 317 Mass. at 490, 58 N.E.2d at 852. There may be one or many motivating reasons for a person's act or omission; but if a person acts or refrains from acting, in complete or partial reliance on a false representation, the element of detrimental reliance is satisfied. See *National Car Rental System, Inc. v. Mills Transfer Company*, 7 Mass. App. Ct. 850, 852, 384 N.E.2d 1263, 1264 (1979).

Defendants argue that because the jury found that plaintiff never owned the formula, plaintiff cannot assert that his "detriment" was loss of rights to the formula. Defendants' Brief for

JNOV at 12-13. While the Court agrees with defendants that plaintiff cannot claim as his legal detriment the loss of rights to the formula, plaintiff adequately proved other legal detriment sufficient to support a finding of fraud. As with the wrongful discharge count, *see supra* at 19-22, plaintiff's rendition of present and continuing service at Hazen Paper Company provides the legal detriment for the fraud claim. All parties agree that plaintiff sought a \$100,000.00 salary in exchange for his continuing employment. Plaintiff testified, and the jury apparently believed, that defendants agreed to pay plaintiff approximately \$44,000.00 in salary, and the balance of plaintiff's compensation in stock. 1 Tr. 98. Thus, the jury could have found that plaintiff continued to work for Hazen Paper Company, after defendants initially promised to give plaintiff stock, in reliance on the stock promise. This provision of continued services in exchange for the stock promise is sufficient to provide "detrimental reliance."

Defendants further argue that plaintiff did not rely to his detriment on defendants' misrepresentation because "plaintiff failed to introduce any evidence indicating that Plaintiff was deprived of alternative employment opportunities by remaining a Hazen employee during the period that the alleged promise was made." Defendants' Brief for JNOV at 13. This argument confuses the element of reliance with the element of damages. Although proof of lost wages or income might help bolster a claim for fraud, plaintiff need not show that his reliance caused him to forego earning opportunities of which he might otherwise have availed himself. Rather, plaintiff need only show that he acted or refrained from acting, at least in part because he relied on the misrepresentation. As discussed *supra*, plaintiff satisfied the reliance element by showing that he continued to work at Hazen Paper Company, after the misrepresentation, in part because the Hazens promised to compensate him with shares of Hazen Paper Company stock in addition to his salary.

With respect to damages, however, a plaintiff who alleges

may recover according to the "benefit of the bargain" rule. *Productora e Importadora de Papel, S.A. de C.V. v. Fleming*, 376 Mass. 826, 838, 383 N.E.2d 1129, 1136-37 (1978); *Rice v. Price*, 340 Mass. 502, 507-511, 164 N.E.2d 891 894-97 (1960). This means that plaintiff may recover as damages the value of the benefit that he would have received had the misrepresentations been true. Under the benefit of the bargain rule, "damages would be measured by the difference in value between the performance promised . . . and that actually rendered." *Fleming*, 376 Mass. at 838, 383 N.E.2d at 1137.

In this case, plaintiff offered evidence of the value of the stock promised him. Plaintiff's witnesses testified to the value of Hazen stock in the relevant years, 2 Tr. 154-55 (John T. Moriarty, certified public accountant), and to the value of the total stock that plaintiff would have received had defendants honored their stock promise. 2 Tr. 193-94 (Dr. Craig L. Moore, professor of management at the University of Massachusetts); *see* Plaintiff's Trial Exhibit 21 (containing Dr. Moore's calculations regarding stock loss, estimated at \$342,498.00). This unrefuted testimony provides sufficient evidence of damages, consistent with the "benefit of the bargain" rule, in an amount equal to the value of the compensation that plaintiff would have received had defendants made good on the stock promise.

In short, because plaintiff offered evidence sufficient to satisfy the elements of fraud, the jury's verdict on Count V will stand.

f. Count VII: Massachusetts Civil Rights Act

On Count VII, the jury found that defendants violated plaintiff's rights under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). The jury awarded damages in the amount of \$1.00.

The Massachusetts legislature created the MCRA to protect individuals from civil rights violations perpetrated by private parties. *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 98, 502 N.E.2d 1375, 1378 (1987) (MCRA contains no

state action requirement). Courts should construe the provisions of the MCRA broadly in order to effectuate the remedial purposes of the statutes. *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822, 473 N.E.2d 1128, 1130 (1985) ("*Batchelder II*").

To establish a violation of the MCRA, a plaintiff must prove that

(1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion."

Bally v. Northeastern University, 403 Mass. 713, 717, 532 N.E.2d 49, 51-52 (1989). Of course, "[n]ot every violation of law is a violation of the State Civil Rights Act." *Longyal v. Commissioner of Correction*, 404 Mass. 325, 333, 535 N.E.2d 588, 593 (1989). "[T]he legislature did not intend to create 'a vast constitutional tort,' and thus explicitly limited the [MCRA]'s remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion." *Bally*, 403 Mass. at 718, 532 N.E.2d at 52, quoting *Bell v. Mazza*, 394 Mass. 176, 182-183, 474 N.E.2d 111 (1985).

Defendants argue that the Court should grant judgment notwithstanding the verdict because, contrary to plaintiff's contention, defendants did not deprive plaintiff of any property rights. Defendants further argue that even if defendants did deprive plaintiff of some property right, no threat, intimidation, or coercion was involved.

Plaintiff, on the other hand, has consistently asserted that defendants used threats, intimidation and coercion in an effort to take plaintiff's property rights to the formula without just compensation. See, e.g., Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 25 (April 13,

1990); Plaintiff's Amended Complaint at 12 (July 26, 1988). Given the jury's verdict as to ownership of the formula, however, this argument must fail. Any claim by plaintiff based on ownership rights to the formula must fail in light of the jury's determination that defendants owned the formula throughout the relevant time period.

Apparently in response to the jury's verdict, plaintiff makes a slightly different argument with regard to his MCRA claim in his post-trial pleadings. Plaintiff now argues that defendants interfered with plaintiff's rights to Hazen Paper Company stock. "[Plaintiff's] property right to the stock was the subject of coercion when the Defendants attempted to extort from him a release of the formula rights without payment of their stock promise." Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 16 (September 25, 1990). Plaintiff claims that defendants violated the MCRA because they did not tender stock as promised, and that they threatened to and did fire plaintiff in order to avoid the stock obligation. Accepting these allegations as true, the Court must nevertheless grant judgment notwithstanding the verdict on Count VII.

The Supreme Judicial Court has never expanded the MCRA to encompass conduct such as that alleged by plaintiff. Most MCRA actions recognized by the Supreme Judicial Court involve the threat of physical contact. *O'Connell v. Chasdi*, 400 Mass. 686, 511 N.E.2d 349 (1987) (sexual harassment in employment); *Batchelder II*, *supra* (plaintiff threatened by shopping mall security officer while plaintiff distributes pamphlets); *Bell*, *supra* (defendants threaten to do "anything at any cost" to prevent improvement of property next door). The Supreme Judicial Court has refused to expand the MCRA to reach drug testing of student athletes by university officials, *Bally*, *supra*, or the improper taking of real property by a town board of selectmen. *Pheasant Ridge Associates v. Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 (1987). Those few MCRA cases that do not involve threats of physical harm have

involved more than simple violations of law. For example, *Redgrave, supra*, concerned conduct that was both in violation of uncontested and existing contract rights, and destructive to the exercise of first amendment or other important individual rights. *See also Longval*, 404 Mass. at 333, 535 N.E.2d at 593 ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion. . . ."); *Karetnikova v. Trustees of Emerson College*, 725 F. Supp. 73 (D. Mass. 1989).

Given this authority, plaintiff's MCRA claim fails. The evidence simply does not demonstrate "threats, intimidation or coercion" as those words have been defined by the Supreme Judicial Court, and this Court cannot change the scope of state law in order to accommodate plaintiff's claim.

g. Count VIII: Breach of Contract

The jury found defendants liable for breach of employment contract, and awarded plaintiff damages in the sum of \$266,897.00.

Defendants contend that no employment contract existed between plaintiff and defendants, and that they are entitled to judgment notwithstanding the verdict on that basis. *See Defendants' JNOV Reply* at 17-19. Defendants further argue that even if defendants did breach an employment contract, plaintiff failed to prove damages resulting from the breach.⁵ The Court, however, finds that an employment contract did exist, and that defendants' conduct, viewed in a light most favorable to plaintiff, constituted breach of that contract. The Court fur-

⁵ In their motion to alter or amend the judgment, defendants argue that the jury adequately compensated plaintiff under the ADEA claim, and that any award of damages for breach of contract is duplicative. Defendants' Memorandum in Support of Motion to Alter or Amend Judgment at 2 (September 11, 1990) ("Defendants' Memorandum to Alter or Amend"). This argument, although made in the motion to alter or amend, is relevant to the issue of judgment notwithstanding the verdict on the breach of contract claim, because it concerns the element of damages. Thus, the Court will consider defendants' duplicative damages argument in the context of judgment notwithstanding the verdict, and will discuss the remainder of defendants' motion to alter or amend *infra*.

ther finds evidence of damages due to the breach. Therefore, the Court denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

A binding employment contract exists where there is certainty as to the parties bound, the nature of the service, and the approximate compensation due. *Parsons v. Trask*, 73 Mass. (7 Gray) 473, 477-78 (1856). A valid employment contract may be "found to exist from the conduct and relations of the parties." *Jackson v. Action for Boston Community Development*, 403 Mass. 8, 9, 525 N.E.2d 411, 413 (1988), quoting *LiDonni, Inc. v. Hart*, 355 Mass. 580, 583, 246 N.E.2d 446, 449 (1969). Where an employee provides services in return for wages paid by the employer, courts will, in the absence of express provisions to the contrary, infer the existence of an at-will employment contract. *Jackson*, 403 Mass. at 13, 525 N.E.2d at 414; *DeRose*, 398 Mass. at 206, 496 N.E.2d at 429.

If nothing more, plaintiff in this case had an at-will employment contract with defendants. Plaintiff received wages in return for services rendered. In addition, the jury could, and apparently did, find that the circumstances surrounding plaintiff's employment and the language in the Hazen Paper Company manual supplied additional implied provisions to plaintiff's employment contract. Massachusetts law permits such a finding. *Jackson*, 403 Mass. at 14, 525 N.E.2d at 415 (collecting cases). Viewing the evidence in a light most favorable to the plaintiff, the jury could have found that the employment contract prohibited defendants from firing plaintiff unless plaintiff committed "outlandish, gross violations of standards or fail[ed] to respond to repeated counselling. . . ." Plaintiff's Trial Exhibit 11 at 3 (Hazen Paper Company Employee Handbook on Personnel Policies and Benefits).

Having established the existence of the contract and its terms, plaintiff also demonstrated that defendants breached the contract. Again viewing the evidence in a light most favorable to

plaintiff, the jury could have found that defendants breached the contract in all or any of three ways: by discharging plaintiff because of his age, by discharging plaintiff in order to prevent him from enjoying his pension rights, or by discharging plaintiff in order to avoid honoring their stock promise. The Court has adequately reviewed the evidence of these illegalities *supra*.

However, once plaintiff establishes the existence of a contract and a breach of that contract, he must also prove that he suffered damages caused by defendants' breach of the contract. *Goldman v. Mahoney*, 354 Mass. 705, 709, 242 N.E.2d 405, 409 (1968); *Gray v. Tobin*, 252 Mass. 238, 147 N.E. 580 (1925). Plaintiff may not collect duplicate damages under a state law theory if the jury has already compensated him under a federal statute. See *Howard v. Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1113 (D. Hawaii 1989) (ADEA case); see also *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1344 n.7 (1st Cir. 1988). Thus, plaintiff's evidence must show that the damages awarded on the breach of contract claim are independent and separate from the damages awarded under the ADEA, ERISA, fraud or other counts.

Defendants here argue that plaintiff's recovery for breach of contract duplicates damages already recovered under the ADEA. The Court rejects this argument. As evidence of damages, plaintiff offered the testimony and calculations of Dr. Moore. While all of the damages stated by Dr. Moore's [sic] were compensable under the ADEA, the jury needed not award the money exclusively under that theory. Rather, the jury could have awarded part of the damages under the ADEA, and part under other theories. The jury awarded \$560,775.00 under the ADEA, \$100,000.00 under ERISA, and \$266,897.00 under the breach of contract claim. Such an award, while fragmentary, is permissible under existing law, as long as the total sum awarded by the jury does not exceed the credible evidence of damages offered at trial.

The Court further notes that under existing law, recovery under the ADEA does not preempt tort or contract claims under

state law. *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989) (plaintiff may recover under ADEA and for breach of employment contract); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1318 (9th Cir.) (court finds that recovery under the ADEA does not preempt award of damages based on defendant's state claim of breach of employment contract), *cert. denied*, 459 U.S. 859 (1982); accord *Pettibon v. Pennzoil Products Co.*, 649 F. Supp. 759, 761 (W.D. Pa. 1986).^{*} The Court therefore denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

2. New Trial

Having found judgment notwithstanding the verdict inappropriate in all respects except as to willfulness and Count VII, the Court must now consider defendants' new trial arguments.

^{*} The Ninth Circuit Court of Appeals, among other courts, has expressed concern with the "wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims. . . ." *Cancellier*, 672 F.2d at 1318. This Court also dislikes the notion that plaintiff can recover under a state contract theory damages that are available under the ADEA. See *Loeb*, 600 F.2d at 1021. Under the ADEA, a plaintiff may recover "'items of pecuniary or economic loss such as wages, fringe, and other job-related benefits.'" *Id.*, quoting H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. Code Cong. & Admin. News at 523, 535. Arguably, plaintiff received under the ADEA all the damages to which he was entitled. Indeed, the Court finds no evidence of record showing that plaintiff suffered damages from the breach of contract separate and independent from those already recovered pursuant to the ADEA, ERISA, or fraud. To the contrary, it seems likely that the awards returned under the various state law counts (totalling \$581,997.00) represent small parts of the larger ADEA award. However, the Court will not speculate as to the jury's calculations. Absent any instructive First Circuit authority with regard to whether plaintiffs can recover, on a state contract theory, damages available under the ADEA, the Court is reluctant to disturb the jury's verdict. Thus, because plaintiff has established the elements of breach of contract, the jury may under existing law award him additional damages under that theory.

The Court may set aside a verdict and grant a new trial "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Phav v. Trueblood, Inc.*, 915 F.2d 764, 766 (1st Cir. 1990) (citations omitted). While a trial court should not grant a new trial simply because the court would have reached a different conclusion, the court wields broad discretion in determining whether to grant a new trial. *de Perez v. Hospital del Maestro*, 910 F.2d 1004, 1006 (1st Cir. 1990). This Court exercises its discretion frugally, and will not grant a new trial unless necessary to prevent a significant dereliction of justice.

Flag Fables, Inc. v. Jean Ann's Country Flags and Crafts, Inc., 753 F. Supp. 1007, 1012 (D. Mass. 1990) (Freedman, C.J.).

Defendants make numerous arguments in support of their motion for new trial. *See generally* Defendants' Brief in Support of Motion for New Trial (September 11, 1990) ("Defendants' Brief for New Trial") and Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for New Trial (October 23, 1990) ("Defendants' New Trial Reply"). Some of these arguments were rejected *supra* with respect to defendants' motion for judgment notwithstanding the verdict, and the Court finds them equally impotent in the new trial context. The Court will, however, briefly discuss two of defendants' most vehement arguments.

Defendants first argue that the jury awarded an excessive amount of damages. While a court may grant a new trial if the jury has awarded excessive damages, a jury may if it chooses award generous damages. In cases involving age discrimination, the district court may set aside damages awards and grant a new trial only if the verdict is "shown to exceed 'any rational appraisal or estimate of the damages that could be based upon

the evidence before the jury.'" *Kolb v. Goldring, Inc.*, 694 F.2d 869, 871 (1st Cir. 1982), *quoting Glazer v. Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967). The cases clearly indicate that where credible evidence of damages exist, the court may not disturb the jury award. *Cf. Hendricks & Associates, Inc. v. Daewoo Corp.*, 923 F.2d 209 (1st Cir. 1991) (court orders remittitur or new trial where jury awarded damages in excess of those sought by plaintiff). "While in calculating damages the jury is free to select the highest figures for which there is adequate evidentiary support, it may go no higher." *Kolb*, 694 F.2d at 872.

It is uncontested that plaintiff alleged total damages in the amount of \$1,375,614.12. 2 Tr. 188 (testimony of Dr. Moore); Plaintiff's Trial Exhibit 21; Plaintiff's Memorandum in Opposition to Defendants' Motion for New Trial at 8 (September 25, 1990). Plaintiff offered the testimony of Dr. Moore and Mr. Moriarty in support of that allegation, and their testimony was unrefuted. It is also true that the jury awarded a total of \$1,242,772.00 in damages on all seven counts, some \$132,842 less than the damages claimed by plaintiff. Because the jury did not select for total damages a figure higher than that alleged by plaintiff and evidenced in the record, the Court will not set aside any portion of the verdict on this basis.

Second, defendants argue that the jury verdict is internally inconsistent, and must therefore be set aside. Defendants argue that "[i]n order to find age discrimination, the jury had to conclude that Plaintiff's age was the 'determinative factor' in his termination. . . . Because Plaintiff allegedly would not have been terminated 'but for' his age, an intent to deprive him of his pension benefits could not, as a matter of law, have been found to be the 'motivating' or determinative factor in his termination." Defendants' Brief for New Trial at 3-4. Defendants thus appear to argue that the jury could not have found two determinative factors behind plaintiff's termination. Defendants demand that a new jury should decide whether plaintiff's age,

or the intent to deprive plaintiff of pension benefits, or neither, was the "determinative factor" behind plaintiff's termination.

As noted above, to recover under section 510 of ERISA, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister*, 859 F.2d at 1111; *Baker v. Kaiser Aluminum and Chemical Corp.*, 608 F.Supp. 1315, 1318 (N.D. Cal. 1984). A discharged employee need not show that the sole objective behind the firing was to interfere with the employee's attainment of pension rights. *Clark v. Resistoflex Co. Division of Unidynamics*, 854 F.2d 762, 770 (5th Cir. 1988), citing *Gavalik*, 812 F.2d at 851. An employee need only show that the employer's desire to interfere with the employee's pension rights "was a 'determinative factor' in [the employer's] decision to terminate him." *Turner*, 901 F.2d at 347, citing *Gavalik*, 312 F.2d at 860.

The First Circuit has never explicitly held that a discharge can be motivated by two different determinative factors sufficient to satisfy both an ERISA and an ADEA claim in the same case. However, in *Loeb*, the First Circuit recognized that employers may have many motivations, both legal and illegal, for firing an employee. *Loeb*, 600 F.2d at 1019. The court of appeals held that while the employee need not prove that age was the sole factor behind the discharge, plaintiff's proof "that [age] was a determinative factor is . . . essential to recovery under the ADEA." *Id.* An employee "had to prove by a preponderance of the evidence that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of his age, he would not have been discharged." *Id.* Other courts have held that plaintiff must prove that the decision to fire was "at least in part motivated by the specific intent to engage in activity prohibited by [ADEA]." *Dister*, 859 F.2d at 1111.

Given this authority, the Court now holds that there may be more than one illegal determinative factor behind an employer's decision to discharge. Plaintiff's theory in this case offers a

good example, where the jury found that the Hazens discharged plaintiff because of his age and in order to interfere with pension rights. Were the rule otherwise, an employer who, for example, violates the ADEA would be immune from liability under ERISA, even if the evidence indicated discharge with the specific intent to interfere with pension rights. The Court cannot believe Congress intended such a construction of the statutes. Further, the Court can find no case in which a court has dismissed a lawsuit, or any portion of a lawsuit, under the ADEA and ERISA on the basis that there can be only one determining factor for the discharge. In sum, the Court finds no internal inconsistency in the verdict, and the motion for new trial is denied.

B. Defendants' Motion to Alter or Amend the Judgment

Defendants have moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Defendants make three separate arguments in support of their motion. First, defendants argue that the jury awarded duplicative damages, and that the Court should alter the judgment to prevent multiple recovery. The Court, having already found this appeal unappealing, *supra* at 30-34, will not taste it again.

Second, defendants contend that plaintiff may not receive prejudgment interest on any part of his award if he has recovered liquidated damages. This is unquestionably true. *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989). However, the point is moot, given the Court's decision to grant defendants' motion for judgment notwithstanding the verdict on the liquidated damages question. Thus, plaintiff may collect interest on his entire award because plaintiff is not entitled to liquidated damages.

Defendants' third argument is that plaintiff may not recover interest on the fraud count because "the jury's award is clearly based upon the higher, present value of the stock." Defendants' Memorandum to Alter or Amend at 3. This argument lacks

merit. The Court must assume that the jury awarded that sum of money it felt necessary to compensate plaintiff for his loss due to defendants' misrepresentation. Indeed, no one except the jury really knows how the jury calculated the fraud award. The fact that plaintiff recovered the value of stock does not make this claim any different from other state tort claims. In fraud cases, plaintiffs often recoup money representing the value of a thing promised but not delivered. Plaintiff shall recover interest at the ordinary rate on the fraud award.

In sum, the Court denies entirely defendants' motion to alter or amend the judgment.

C. Plaintiff's Motion for Attorney's Fees and Costs

1. Attorney's Fees

Plaintiff has moved for an award of attorney's fees in the sum of \$666,729.12. Defendants oppose plaintiff's request, and urge the Court to allow a much more modest award.

A successful plaintiff is entitled to collect reasonable attorney's fees under the ADEA. Section 626(b) of the ADEA requires that the provisions of the ADEA shall be enforced in accordance with the remedies and procedures provided in section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 ("section 216"). As amended, section 216 states that "[t]he court . . . shall, in addition to any judgment award to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action." The statutory language makes the award mandatory; the Court has discretion only to determine the amount of the fee award.

In civil rights cases, courts use the lodestar method to determine appropriate attorney's fees awards. *Blum v. Stenson*, 465 U.S. 886 (1984) (42 U.S.C. § 1983); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985) (ADEA). The lodestar is calculated by multiplying all of the hours reasonably expended on the litigation by a

reasonable hourly rate. *Blum*, 465 U.S. at 888. Courts should calculate reasonable attorney's fees according to prevailing market rates. *Id.* at 895. Once the court has determined the lodestar, the court may adjust the lodestar, up or down, if necessary to assure fair and adequate compensation for counsel. Courts should allow upward adjustment only "in some cases of exceptional success," *Hensley*, 461 U.S. at 435, and where plaintiff's counsel proves "that such an adjustment is necessary to determination of a reasonable fee. . . ." *Blum*, 465 U.S. at 898.

Section 1132(g) of ERISA also allows courts to award attorney's fees, but under different circumstances. While the ADEA provides for a mandatory fees award, section 1132(g) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The award of attorney's fees under ERISA falls within the broad discretion of the district court. *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 259 (1st Cir. 1986). The court must apply a five-pronged test when considering whether to award attorney's fees.

This five factor standard considers (1) the degree of bad faith or culpability of the losing party; (2) the ability of such party to personally satisfy an award of fees; (3) whether such award would deter other persons acting under similar circumstances; (4) the amount of benefit to the action as conferred on the members of the pension plan; and (5) the relative merits of the parties' positions.

Id. at 257-58. If, upon consideration of these factors, the district court decides to award fees, the court may rely on the lodestar method to determine the amount of the award. *Hensley*, 461 U.S. at 433 n. 7 (lodestar analysis is generally applicable in all federal fee-shifting situations); *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1382-83 (9th Cir. 1990).

The Court finds that the circumstances of this case make an

award of attorney's fees under ERISA appropriate. In particular, the evidence that plaintiff had more than nine years service at Hazen Paper Company, and that defendants fired plaintiff in order to interfere with his attainment of pension rights tips in favor of an award of attorney's fees. The general deterrent value of an attorney's fee award on industry and pension plans in the area also makes an award suitable.

Plaintiff also prevailed on various state law claims, none of which provide for attorney's fees.⁷ Ordinarily, a prevailing litigant in the United States may not recover attorney's fees or costs of his action absent an express legislative directive to the contrary. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 247 (1975). However, the *Alyeska* rule does not prevent fee-shifting when a plaintiff successfully prosecutes a claim under a federal civil rights statute, and in the same action seeks additional or similar relief under other federal theories or pendant state law theories. Under these circumstances, a plaintiff may recover attorney's fees incurred for both his civil rights claim and the companion claims, regardless of whether the statutes upon which the companion claims are based provide for attorney's fees awards. *Hensley*, 461 U.S. at 435; *Wagenmann v. Adams*, 829 F.2d 196, 225 (1st Cir. 1987). Of course, the additional claims must bear a close relationship to the federal civil rights claim. If all the claims share "a common core of facts," or are based on "related legal theories," *Hensley*, 461 U.S. at 435, an attorney's fees award should compensate plaintiff based on the time spent on the litigation as a whole. *Accord Aubin v. Fudala*, 782 F.2d 287, 290-92 (1st Cir. 1986) (42 U.S.C. §1983).

In the end, the determination of the attorney's fees award remains in the sound discretion of the district court. *United States*

⁷ Section 111 of the MCRA provides that "[a]ny aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court." While the jury returned a verdict in favor of plaintiff on the MCRA claim, the Court today grants judgment notwithstanding the verdict on that claim. Therefor plaintiff may not rely on the MCRA for an award of costs or attorney's fees.

v. Metropolitan District Commission, 847 F.2d 12, 14 (1st Cir. 1988). While the district court must supply an ample explanation for the fee award, *id.* at 16, and must "explain why it makes a substantial adjustment, up or down, of a diary-supported bill," *Jacobs v. Mancuso*, 825 F.2d 559, 560 (1st Cir. 1987), the district courts need not "drown in the rising tide of fee-generated minutiae." *Metropolitan District Commission*, 847 F.2d at 16.

Plaintiff has submitted ledgers detailing the work performed on the case. The ledgers include the date and type of work performed, an identification of the person who performed the work, and the amount of hours the work required. Plaintiff has also submitted an itemized, computerized record of daily time entries logged by the various individual attorneys that worked on the case. Plaintiff has further submitted affidavits detailing the rates ordinarily commanded by plaintiff's attorneys, and the rates ordinarily charged for cases of this nature. Plaintiff has also explained the contingent nature of the case, and the fact that Mr. Biggins lacked the personal means to bear the costs of maintaining the action since its inception in February of 1988. The Court finds all of these submissions helpful and adequate for the purpose of determining the lodestar.

The Court has carefully examined the documentation in order to determine the number of hours reasonably expended. The Court finds that the documentation adequately distributes core and non-core time. The Court further finds no unreasonable or duplicative fees, and defendants have pointed to no specific instances of misrepresentation or duplicity. The Court finds that plaintiff properly included as core hours the time necessary to complete fee applications. Therefore, the Court adopts, as the number of hours reasonably expended, the core and non-core hours calculated by plaintiff in his motion for attorney's fees and costs. Plaintiff's Motion for an Award of Attorney's Fees and Costs (September 26, 1990) (see exhibit A) ("Plaintiff's Motion for Fees").

However, the Court will adjust slightly the hourly rates re-

requested by plaintiff. Plaintiff has properly distinguished between core and non-core activities in his fee submissions, but he failed to adopt a different, lower rate of compensation for the non-core hours. The Court, adopting plaintiff's suggestion, will award \$165.00 per hour for core work performed by partners at Egan, Flanagan & Cohen, P.C., but the Court will award \$100.00 per hour for non-core work performed by these experienced attorneys. See *M. Berenson Co. v. Faneuil Hall Marketplace*, 671 F. Supp. 819, 831 (D. Mass. 1987) ("The court need not set the same rate for all work performed by a particular attorney; it may assign a different hourly rate to different categories of tasks."). Because no other attorneys performed non-core work, the Court need not discuss other core/noncore payment differentials. The Court will adopt plaintiff's suggestion to compensate Attorney Heemskerk at \$135.00 per hour, and the Court will compensate other Egan, Flanagan & Cohen associates at \$100.00 per hour. The Court will compensate for paralegal time expended at \$50.00 per hour, regardless of the nature of the work.⁸

Having found the requested hours fair and reasonable, and having determined reasonable rates of compensation, the Court calculates the lodestar as follows.

⁸ In determining the hourly rates, the Court has considered, among other things, the following factors: (1) the amounts awarded in other recent cases, such as *Refuse & Environmental Systems Inc. v. Industrial Services of America*, 732 F. Supp. 1209 (D. Mass. 1990) (Freedman, C.J.) and *Cowan v. Prudential Insurance Company of America*, 728 F. Supp. 87 (D. Conn. 1990); (2) the Court's familiarity with the value of legal services in the current market generally and within this district in particular; (3) plaintiff's suggested rates; and (4) the submitted affidavits of local attorneys.

Partners			
Core Hours		Rate	Totals
959.40	x	\$165.00	= \$158,301.00
Non-core Hours			
99.90	x	100.00	9,990.00
Associates			
Atty. Heemskerk			
.25	x	135.00	= 33.75
Other Associates			
57.60	x	100.00	= 5,760.00
Paralegal			
29.60	x	50.00	= 1,480.00
LODESTAR FIGURE			\$175,564.75

The Court's lodestar figure is \$6,493.50 less than the lodestar calculated by plaintiff. This difference occurs solely because the Court compensates partners' non-core work at \$100.00 per hour, whereas plaintiff's figures compensated partners' non core work at \$165.00 per hour.

As noted above, the Court may adjust the lodestar figure if necessary for the determination of a reasonable and fair fee. *Blum*, 465 U.S. at 898. Plaintiff argues that the Court should enhance the fee award to an amount equal to one-third of the total damages awarded, or \$666,729.12. Defendants, of course, oppose any such adjustment.

In *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), Justice O'Connor⁹ decided that while a district court could properly consider the contingent nature of a case when determining a reasonable

⁹ The Supreme Court issued three opinions in *Delaware Valley II*. Justice White, representing four members of the Court, wrote the plurality opinion. Four other justices dissented in an opinion written by Justice Blackmun. Justice O'Connor, writing on her own behalf, concurred in part and in the judgment, but agreed with the dissenters on one important point.

Because Justice O'Connor cast the decisive fifth vote in *Delaware Valley II*, her opinion represents a majority of justices to the extent that she expressed agreement with either the plurality or the dissent. Thus, the Court accepts Justice O'Connor's opinion as the law of the land on the issue.

attorney's fee under federal fee-shifting provisions, *id.* at 731, "a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." *Id.* at 733. Likewise, the Court cannot adjust the lodestar due to the "'legal' risk or risks peculiar to the case." *Id.* at 734. Neither may the Court consider the quality of the representation or the complexity of the case when considering adjustment of the lodestar. *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"). Rather, the lodestar "'is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 564, citing *Blum*, 465 U.S. at 897.

This case is not sufficiently rare or exceptional to justify an enhancement of the lodestar. The Court is satisfied that the lodestar adequately compensates counsel for the work provided in this action, and that an award of \$175,564.57 is sufficient to attract competent counsel in the relevant market. Furthermore, the Court cannot, under the law or consistent with conscience, award an attorney's fee almost four times the amount of the lodestar. Such a departure would be an abuse of discretion in light of the frugal methods adopted in recent Supreme Court cases. In sum, because the Court finds that the lodestar figure embodies a reasonable attorney's fee within the meaning of the ADEA and ERISA, the Court will award plaintiff that amount.

2. Costs

Plaintiff may also recover costs of the action under the ADEA and ERISA. As with the attorney's fees, plaintiff may recover costs incurred on the entire action, not just on the federal claims.

Plaintiff claims to have incurred \$13,276.57 in costs on the action. The bill properly includes photocopying costs, service of process costs, postage, and other incidentals. However, the bill of costs also includes substantial expert witness fees.

Successful civil rights plaintiffs may not recover more than

\$30.00 per day for expert witness attendance fees absent an explicit statutory provision. 28 U.S.C. § 1821; *Denny v. Westfield State College*, 880 F.2d 1465, 1468-71 (1st Cir. 1989); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573-75 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); *see also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). Plaintiffs may, however, recover the costs incurred by experts during case preparation, for strategic advice rendered outside the courtroom, and so forth. *Denny*, 880 F.2d at 1474 (Breyer, C.J., concurring) (collecting cases). The ADEA and ERISA, while they do provide for "costs" awards, do not explicitly allow for recovery of expert witness fees. Therefore, the Court must deduct from the costs award those amounts, beyond \$30.00, incurred as a result of Dr. Moore's and Mr. Moriarty's attendance.

Plaintiff's bill of costs indicates that plaintiff spent \$4,207.50 for the services of Peat, Marwick, Main & Associates, the firm for which Mr. Moriarty works. The bill also shows that Dr. Moore commanded fees totaling \$2,945.50. Unfortunately, the bill does not definitively indicate what portion of these fees resulted from the experts' attendance and testimony at trial, and what portion resulted from other, recoverable services rendered by the experts. The Court cannot determine whether the experts charged an hourly fee for attendance, or if they charged lump-sum appearance fees. However, the quality of the testimony and the preparation necessary to properly testify indicates that a substantial portion of the experts' fees were incurred before the experts actually testified. It is fair and reasonable to assume that half of the costs chargeable for the experts resulted from actual testimony time, and half was due to trial preparation and strategy. Thus, plaintiff may recover one-half of expert fees plus the \$30.00 attendance fees. The arithmetic yields the following result.

Plaintiff's Costs Incurred	\$13,276.57
One-half of Dr. Moore's Fees	- 2,103.75
One-half of Mr. Moriarty's Fees	- 1,472.75
Allowable Attendance Fees	+ 60.00
TOTAL COSTS ALLOWED	\$ 9,760.07

D. Plaintiff's Motion to Increase the Amount of the Bond

The Court denies this motion. The question of whether to increase the amount of security is now moot because the Court has ruled on the post-trial motions and plaintiff can execute the judgment. Should defendants appeal today's ruling, they must of course comply with Fed. R. Civ. P. 62(d) and Rule 62.2 of the Local Rules of the United States District Court for the District of Massachusetts.

IV. CONCLUSION

For the reasons stated above, the Court

(1) GRANTS defendants' motion for judgment notwithstanding the verdict on the question of liquidated damages and on count VII, and DENIES the motion for judgment notwithstanding the verdict or new trial in all other respects;

(2) DENIES defendants' motion to alter or amend the judgment;

(3) GRANTS plaintiff's motion for attorney's fees in the amount of \$175,564.57, and for costs in the amount of \$9,760.07; and

(4) DENIES plaintiff's motion to increase the amount of the bond.

The Clerk is hereby ORDERED to enter judgment in accordance with today's Memorandum and Order, and to award prejudgment interest on the entire award at the appropriate rates.

It is So Ordered.

Chief United States District Judge

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No. 91-1600

Supreme Court, U.S.
FILED

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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HAZEN PAPER COMPANY, ET AL.,
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WALTER F. BIGGINS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

A. The Case Below

This action was originally filed in the district court of Massachusetts in February 1988. The plaintiff, Walter Biggins, was terminated from his employment by the defendant, Hazen Paper Company, and alleged in his complaint violations by

Hazen Paper Company, Thomas Hazen and Robert Hazen (collectively hereinafter Hazen), of the ADEA, 29 U.S.C. §§ 621, et seq. The Age Discrimination in Employment Act, ERISA 29 U.S.C. §§ 1001, et seq. Employee Retirement Income Security Act, the Massachusetts Civil Rights Act M.G.L. c. 12, § 11I, breach of contract, fraud, conversion and wrongful discharge.

The case was tried for five days to a jury which found that the defendants willfully violated the ADEA, violated ERISA, committed fraud, breached plaintiff's employment contract, and wrongfully discharged him¹ (Pet. App. 51-52).² As a result of the jury's finding of willfulness, the district court awarded liquidated damages in the ADEA claim (Pet. App. 52).

The district court (Freedman, C.J.) subsequently issued a post trial Memorandum and Order allowing the defendants' motion for judgment notwithstanding the verdict on the finding of willfulness and on the Massachusetts Civil Rights Act claim. The remainder of the jury's verdict was upheld (Pet. App. 50-80). The district court also awarded the plaintiff attorneys' fees and expenses, but denied the plaintiff's request to enhance the attorneys' fees award due to the contingent nature of the fee arrangement (Pet. App. 80-87).

Both parties filed appeals to the United States Court of Appeals for the First Circuit. On January 8, 1992, the First Circuit issued its decision affirming the judgment on the ADEA

¹ Damages assessed were as follows:

ADEA	\$560,775.00
ERISA	\$100,000.00
Fraud	\$315,000.00
Breach of Contract	\$266,897.00
Wrongful Discharge	\$ 1.00

² References are as follows:

Petition for Writ of Certiorari	Pet.
Petitioner's Appendix	Pet. App.
Appendix for the First Circuit Court of Appeals	C.A. App.

finding and overturning the district court's reversal of the jury's finding of willfulness. The Court affirmed the findings on the violation of ERISA, fraud and wrongful discharge, but reversed the judgment in favor of Biggins for breach of contract (Pet. App. 3-49).

The evidence at trial showed that Biggins was employed by the defendants from 1977 to June of 1986 as their technical director (C.A. App. 458). Hazen Paper Company is a "paper converter" located in Holyoke, Massachusetts (C.A. App. 290-291). The company applied decorative coatings to paper for use in cosmetic wrap, lottery tickets and pressure sensitive labels (C.A. App. 290-291). The company was owned by the defendants Thomas and Robert Hazen, and at the time of Biggins' arrival in 1977, it had \$8,994,000.00 of gross annual sales (C.A. App. 1410).

During Biggins' tenure at the company, he developed several products, the most significant of which came to be known as the "Biggins' Acrylic." (C.A. App. 323-325.) When Biggins arrived, the company was using nitrocellulose and vinyl coatings which produced hazardous emissions which had to be eliminated due to the mandates of the Clean Air Act (C.A. App. 307-309). Working on his own, and often at home, Biggins developed a water based acrylic that exceeded the requirements of the environmental laws and produced a superior product (Pet. App. 11). The product became widely used, and company sales increased dramatically (C.A. App. 639, 679). By the time of trial, Hazen Paper Company's annual sales were over \$40,000,000.00 (C.A. App. 1276, 1304, 1410).

Citing the success of his invention, and his other achievements, Biggins sought increased compensation from the company (Pet. App. 11). Thomas Hazen told Biggins that he could not meet Biggins' request for a \$100,000 per year salary in cash, but promised he would instead give Biggins a "piece of

the company" in stock, making up the difference between his base salary and \$100,000 with the stock (C.A. App. 349). Biggins accepted. The stock was never provided and Biggins' requests were put off (C.A. App. 350, 356, 470). In the spring of 1986, Robert and Thomas Hazen confronted Biggins and accused him of disloyalty to the company, claiming he was involved in two businesses with his son (C.A. App. 357-361). Biggins responded that the Hazens had given prior approval to his activities which were limited to advising his son (C.A. App. 362-363). He further pointed out that one of the businesses had not operated for two years, neither had ever made any money, and the businesses did not compete with Hazen (C.A. App. 362-370). The Hazens demanded Biggins sign an agreement which included a burdensome non-compete clause, and confidentiality covenants (C.A. App. 1138-1142). None of the younger employees in Biggins' department were required to sign such an agreement (C.A. App. 373). Biggins requested the compensation arrangement set up by Thomas Hazen be incorporated in any agreement (C.A. App. 374-378). The Hazens refused, however Biggins' younger successor was given these benefits in his agreement, with a covenant not to compete that encompassed one quarter of the time required of Biggins, and the successor was to be compensated while he did not compete, unlike Biggins who would not be compensated during the term of his non-compete (C.A. App. 775, 779, 1501-1508). Biggins was told to sign (on the eve of his pension benefits vesting) or be terminated. When he refused, Thomas Hazen fired Biggins (C.A. App. 377-378).

B. Errors in the Petition

The petitioners erroneously assert that "the uncontradicted evidence showed that Biggins acted contrary to prior assurances" he had given the Hazens, and that Biggins had been

marketing services he performed for Hazen to competitors. This assertion was specifically disputed at trial by evidence presented by Biggins and others. That evidence confirmed that these were business ventures of his son which Biggins aided in a minor way, with the permission of Thomas Hazen and from which he received absolutely no benefit or reward (C.A. App. 688-689, 390-395, 793-794). Clearly, the jury resolved this factual dispute in favor of Biggins.

The Hazen petition erroneously seeks to create the impression that Biggins' assertion of age discrimination and the opinions of the district court and the First Circuit were based solely on the plaintiff's pension status as a "proxy" for age discrimination (Pet. 14). In fact, Biggins presented a whole range of factors which demonstrated intentional age discrimination on the part of the defendants: disparate treatment of the plaintiff in employment terms as compared to younger members of his department and his younger successor, the insistence (causing his termination) that he sign an agreement detrimental to someone his age, the attempt to strip Biggins of his pension rights at age sixty-two on the eve of vesting, together with forfeiture of his health, life and disability insurance, while seeking to retain him as a consultant, and specific age related remarks directed at Biggins. The Hazens tried to cover up their misconduct by filing a statement under oath with the Massachusetts Department of Employment and Training, claiming that Biggins had voluntarily left the company (C.A. App. 533-535, 1352). Petitioners also create the inaccurate impression that the district court relied solely on Biggins' pension status in finding age discrimination. The district court specifically stated that the evidence of age discrimination included disparate treatment with younger employees in terms of the trade secret and confidentiality agreement, disparate treatment in the terms of employment with his thirty-five year old successor (Pet. App. 55), termination on the eve of his pension vesting, (as evidence

of age discrimination and not as a proxy for age itself) (Pet. App. 55), defendants' knowledge of this status (Pet. App. 56), and specific age related remarks on insurance and health matters by the Hazens (Pet. App. 56). The district court also specifically cited as further evidence of age discrimination, the attempt to retain Biggins' services as a consultant without key benefits such as life, health and disability insurance, provided to all younger employees (Pet. App. 56).

The petitioners are also erroneous in their description of the First Circuit's reliance on pension status as being the sole grounds or proxy for age discrimination: the First Circuit specifically cited the same factors noted above by the district court, further noting that Thomas Hazen testified that he was absolutely aware that age discrimination was illegal (Pet. App. 12-14).

The facts placed in evidence, therefore, involved multiple actions and factors amounting to intentional age discrimination, and not a single factor as a proxy for it.

II. REASONS FOR DENYING THE PETITION

A. THIS PETITION DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW TO BE RESOLVED BY THIS COURT

1. This Case Does Not Present a Proper Occasion to Readdress the Court's Established Definition of Willfulness

Petitioner argues that the First Circuit's decision with respect to willfulness under the ADEA should be reversed by this Court on grounds that it "disserves" Congressional intent and conflicts with decisions of other Circuit Courts. This case does not present such a situation. Here the First Circuit directly applied the applicable Supreme Court precedent for defining willfulness, which is not erroneous in the circumstance of an

individual discrimination case. Secondly, to whatever extent a conflict among the Circuit Courts may exist on this issue, it is analytically insubstantial, and this case does not present an appropriate opportunity to resolve the question, because the same result would be reached regardless of which willfulness standard was applied. Consequently, the treatment of these cases does not conflict in any intolerable way, so as to require the intervention of this Court.

First, the petitioners misstate the holding of the First Circuit as to willfulness, stating that the First Circuit's opinion will lead to double damages in every case of discriminatory treatment and that it gives life to the "awareness of the ADEA in the picture" standard, rejected by the Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In fact, the First Circuit's opinion, plainly and directly follows the dictates of this Court set down in *Thurston* and again (under the Fair Labor Standards Act) in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), stating "we therefore adopt, without modification or qualification, the *Thurston* test for willfulness." (Pet. App. 20.)

This standard does not create willfulness in every individual case as petitioners state. First, not all individual cases are disparate treatment cases. Indeed in this very case petitioners in their second question presented, treat this case as a disparate impact case (see below). Secondly, under this test, the employer always has the defense of lack of knowledge of the law's requirements and good faith, (e.g. reliance on opinion of counsel) defenses for which the employer in this case offered no evidence. Not protected under the *Thurston* standard is the employer, who, knowing age discrimination is illegal, acts to intentionally discriminate against an individual on the basis of age. There is absolutely no reason to believe that in such a case Congress did not fully intend for such an employer to suffer additional liability in the form of liquidated damages.

The petitioners further incorrectly suggest that the First Circuit's decision somehow raises the specter of the standard for willfulness (once adhered to by some Circuit Courts under the FLSA (29 USC § 216)) of "awareness of the ADEA being in the picture." See *Coleman v. Jiffy June Farms*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). The First Circuit's opinion adheres strictly to *Thurston*, and *Thurston* alone, and it was the *Thurston* decision which rejected the "in the picture" standard. *Trans World Airlines v. Thurston*, 469 U.S. at 128. It is a matter of common sense that if an individual, knowing that age discrimination is illegal, then acts to discriminate against someone on the basis of their age, he or she is acting knowingly and intentionally in violation of the Act and is not merely the victim of the existence of an indiscernible statute.³

Ironically, the petitioners assert (with respect to the second question presented), that this is not a disparate treatment case at all.⁴

Petitioner asserts that the writ should be granted because of a conflict among the Circuit Courts as to the definition of willfulness in a disparate treatment case. This case, however, does not present an appropriate vehicle for resolving such conflict, if indeed one exists at all, since Biggins would prevail under any of the standards utilized in the various Circuit Courts.

The Circuit Court decisions at issue fall into three categories: those requiring "outrageous" or "egregious" conduct, *Dreyer*

³ Petitioners footnote 7 also implies some significance to the fact that *one* defendant acknowledged he knew age discrimination to be illegal. That "one defendant" was Thomas Hazen who owned 2/3 of the company stock, was Biggins' direct supervisor and the person who terminated him. (C.A. App. 377-378).

⁴ Petitioner argues that the underlying ADEA case should be reviewed by this Court because the First Circuit created a "per se rule equating pension status with age" (Pet. 14) and thereby used a neutral factor as a proxy for age (Pet. 14-16). This argument effectively asserts that this is a disparate impact case.

v. Arco Chemical Co., Div. of Atlantic Richfield Co., 801 F.2d 651, 658 (3d Cir. 1986), *Hansard v. Pepsi Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989), those requiring that there be "direct evidence" of age discrimination, *Neufeld v. Searle Lab*, 884 F.2d 335, 340 (8th Cir. 1989), and those requiring age be shown to be the "determining" or "predominant" factor. *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152 (6th Cir. 1988), *Cooper v. Asplandh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988). The majority of Circuits, as did the First Circuit here, contrary to the petitioners' assertion, follow the plain *Thurston* standard without elaboration (although the Second Circuit "continuum" analysis arguably differs to a slight degree). See *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989), *Taylor v. Home Ins. Company*, 777 F.2d 849, 859 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986), *Brown v. M&M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989), *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494-95 (9th Cir. 1986), *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990).

Biggins presented evidence that would have met any of these tests. There was evidence that age was in fact both the predominant and determining factor in his discharge, given that, as the First Circuit noted, age was inexorably tied up in the decision to terminate him,⁵ and Biggins presented evidence

⁵ As argued below, Biggins does not accept the petitioners' assertion that the First Circuit found age discrimination solely as a result of pure pension discrimination, which could have theoretically occurred to a younger employee. The reason that the pension discrimination which occurred was most certainly also age discrimination is that the time of a pension to vest (and the loss of health, life and disability insurance) clearly has a greater significance to a sixty-two year old individual, than a thirty year old, who can regain pension status elsewhere. Consequently the act of forcing Biggins to sign certain agreements which were burdensome and which were not required of younger, similarly situated employees, on the eve of his pension vesting, at age sixty-two was particularly designed to take advantage of his age.

of actual disparate treatment, age based remarks, and pension and benefit discrimination.

The same is true of any requirement of "direct evidence of age discrimination:" specific age based remarks together with disparate treatment constitute direct evidence of age discrimination. As the First Circuit noted, the jury's finding of willfulness had a "solid evidentiary foundation" (A-21), and the plaintiff survived an erroneous district court jury instruction on age discrimination, which, the First Circuit noted, created a higher standard, by requiring a "bad purpose." (A-21).

Even the "outrageous" or "egregious" requirements of the Third and Fifth Circuits are met on the facts here, for the jury found the defendants' guilty of common law fraud in their failure to pay Biggins his stock: the very issue on which the defendants used Biggins' age as a negotiating weapon in the events leading up to his termination. Also, in the *Dreyer* case, the Third Circuit specifically stated that "termination of an employee at a time that could deprive him or herself an imminent pension might show the 'outrageousness' of conduct that would warrant double damages." *Dreyer* at 658. Furthermore, the Hazens, having dismissed Biggins, defrauded him of his stock and unlawfully forfeited his pension, then advised the Massachusetts Department of Employment and Training under oath that Biggins had voluntarily left their employ (C.A. App. 533-535, 1352). Clearly, the evidence in this case meets any standard for willfulness.

Analysis of these cases also demonstrates that when all of the underlying circumstances are considered, there is in fact no genuine conflict among the Circuits that either requires resolution or can be resolved by this case. This is because the apparent difference among the Circuits on defining willfulness results from different criteria for proof of the underlying age violation. The ultimate result, in terms of what a plaintiff must prove to show a willful violation of the act, does not differ

significantly. This can be seen from comparing the First Circuit standards for proof of an underlying age violation with those in Circuits with a different definition of willfulness.

In the First Circuit, once an age plaintiff has made out a prima facie case and the employer has articulated a legitimate reason for its action, the plaintiff then has a burden of proving that the legitimate reason was not just false or a pretext, but a pretext for age discrimination, i.e. the plaintiff must show "a discriminatory motive based on age." *Connell v. Bank of Boston*, 924 F.2d 1169, 1172 (1st Cir.), cert. denied, 111 S.Ct. 2828 (1991), *Mesnick v. General Electric*, 950 F.2d 816 (1st Cir. 1991), *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990). However, those Circuits which have adopted an elevated standard of willfulness and which have ruled on this issue of pretext, have adopted a less stringent standard of proof for the underlying ADEA case than has the First Circuit.

The Third Circuit, for instance, has held that where a plaintiff demonstrates that the proffered reasons for the action are pretextual, because of inconsistencies and implausibilities, summary judgment must be denied. *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3d Cir. 1987), cert. denied, 484 U.S. 1019 (1988), and see *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir.), cert. denied, 469 U.S. 1087 (1984).

The Fifth Circuit holds that evidence used to prove a prima facie case can be used to sustain the presumption on the issue of pretext. *Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982).

The Eighth Circuit holds that the employee's submission of a discredited explanation is sufficient evidence of discrimination. *MacDissi v. Valmont Industries*, 856 F.2d 1054 (8th Cir. 1988), *Accord Brooks v. Munroe System*, 874 F.2d 202 (8th Cir.), cert. denied, 110 S.Ct. 153 (1989).

The Tenth Circuit likewise holds that casting doubts on the employers cited reasons is sufficient. *E.E.O.C. v. University of Oklahoma*, 774 F.2d 999 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

This is consistent with the First Circuit's observation here, that, at least with respect to some apparently differing tests for willfulness, the required ingredient for willfulness was already included in the proof of the underlying claim (Pet. App. 20). Biggins in fact presented evidence sufficient to satisfy any of the standards in question. The claim that conflict exists among the Circuit Courts on willfulness results not so much as from a disagreement over what should constitute willful violations, as from differing analyses of the case as a whole and, in particular, the underlying ADEA violation. Resolution of this problem would require the Court to address the additional question of what is sufficient proof of the underlying ADEA violation: an issue not presented by this case, since Biggins presented evidence which satisfies any test for an underlying violation. In any event, although not all Circuit Courts have addressed both the underlying proof issue and the willfulness issue, it seems likely that in all Circuit Courts, where an individual shows intent to discriminate on the basis of age, together with knowledge of age discrimination's illegality, willfulness will be found. Whatever conflict that exists among the Circuit Courts therefore, could not be adequately resolved in this case, particularly with its complex fact pattern (including acts of common law fraud) which is unlikely to appear in most ADEA cases. See *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied where resolution of the conflict would not change the outcome below).

It should be noted as well, that this Court has in this term denied certiorari on this same issue in *American Ass'n of Retired Persons, Inc. v. Farmers Group Inc.*, 943 F.2d 996 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 937 (1992), and has pre-

viously denied certiorari in *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989), *cert. denied*, 493 U.S. 1064 (1990). In addition, none of the Circuit Court decisions at issue ever reached an en banc panel, and, in this case, a request for hearing en banc was denied.

B. THERE ARE NO GROUNDS FOR REVIEWING THE FIRST CIRCUIT'S DECISION ON ADEA LIABILITY

Petitioners argue that the lower courts' decisions regarding liability in the underlying ADEA claim should be reviewed on grounds that the First Circuit created a *per se* rule equating interference with pension vesting and age discrimination, which allegedly conflicts with a decision of the Seventh Circuit in *Wheeldon v. Monon Corp.*, 946 F.2d 533 (7th Cir. 1991).

The petitioners erroneously assert the creation of such a *per se* rule in this case, and erroneously asserted the existence of a conflict among the Circuits.

As plaintiff has noted above, this is most certainly not a case involving pure pension discrimination or interference with pension vesting, nor was it so treated by the First Circuit or the district court. Both courts specifically referenced disparate treatment from younger members of his department, disparate treatment from his thirty-five year old successor, termination on the eve of pension vesting, specific age related remarks on insurance and health, and the attempt to retain Biggins as a consultant without the benefits provided to younger employees. Therefore, this action involved numerous items of evidence, indicative of intentional age discrimination, one of which involved Biggins' pension status. However, it is not Biggins' pension vesting status *per se* that was the source of age discrimination, but rather the context in which it arose: that of a

sixty-two year old, hours away from having his pension vest, at a time and an age where he would obviously not have an opportunity to vest in another pension, despite the likely need, *given his age*, for such protection. The pension discrimination in this case was evidence of age discrimination, not the age discrimination in and of itself. The district court analyzed the case in precisely this manner, citing, *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991), and *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41 (2d Cir. 1989) (A-44). Likewise, the First Circuit described all of the evidentiary factors related to age discrimination, and stated that not only could the jury conclude there was a decision to fire Biggins before his pension vested, but that "the jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins." (A-14).

To the extent pension was significant in this case, it was significant *because* of Biggins' age. This is not therefore a case where pension was a proxy for age, as the petitioners allege.

The further assertion that the First Circuit's decision creates a conflict among the Circuit Courts is also erroneous. Petitioners cite *Wheeldon v. Monon Corp.*, 946 F.2d 533. *Wheeldon* did not involve the same issue. There, an individual claimed he had been terminated because he already possessed a *military* pension from the United States (not his employer), and that he, therefore, was regarded by his employer as more easily expendable because of his other source of income, and consequently was terminated based on a factor arguably related to age. *Wheeldon*, 946 F.2d at 536. This is a far cry from the present case which involves the company's own pension plan, which it controlled, (C.A. App. 957-960) and where Biggins' pension status was one of several factors tied in with his age that led to his termination.

Therefore, this case in no way presents an important question of federal law erroneously decided, or an intolerable conflict among the Circuit Courts.

CONCLUSION

For the reasons cited above, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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MOTION
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No. 91-1600

**In The
Supreme Court of the United States
October Term, 1991**

**HAZEN PAPER COMPANY, et al.,
Petitioners,**

v.

**WALTER F. BIGGINS,
Respondent.**

**Petition for Writ of Certiorari to the United States
Court of Appeals for the First Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF AMICI CURIAE
NATIONAL ASSOCIATION OF MANUFACTURERS
AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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May 1, 1992**

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The National Association of Manufacturers ("NAM") and the Associated Industries of Massachusetts ("AIM") request leave to file the appended amicus brief in support of the petition for a writ of certiorari filed in this case by Petitioners. The two associations are business organizations whose members include nearly all of the largest private employers in Massachusetts and the nation.

NAM's members employ approximately 85% of all workers in the nation's manufacturing sector, including hundreds of thousands of workers over the age of forty whose employment status is affected by the Age Discrimination in Employment Act ("ADEA"), the statute at issue in this case. AIM's members employ a substantial majority of all workers in the Commonwealth of Massachusetts, including tens of thousands of workers whose employment status is affected by the ADEA.

As discussed in the appended brief, NAM and AIM believe the decision of the Court of Appeals in this case makes two highly significant misreadings of the ADEA. NAM and AIM request the opportunity to file the appended amicus brief which discusses those errors of law and explains how and why those errors will, unless corrected by this Court, cause serious injury to American businesses and the ability of American businesses to compete in the world marketplace.

Amici believe that their brief may provide the Court with a perspective on the importance of the issues raised by the petition in this case which may assist the Court in ruling on that petition.

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INTEREST OF AMICI

This brief is filed on behalf of the National Association of Manufacturers and the Associated Industries of Massachusetts (the "Amici"). Amici are business organizations whose members and supporters include nearly all of the largest non-governmental employers in Massachusetts and throughout the nation.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association with a membership of approximately 12,000 manufacturing and related businesses. Its members employ approximately 85% of all workers in the nation's manufacturing sector and produce more than 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM's members employ millions of workers over the age of forty whose employment status is affected by the Age Discrimination in Employment Act ("ADEA"). NAM's members likewise provide their employees with a wide range of benefits under benefit plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). NAM and its members are thus directly and significantly affected by judicial interpretations of ADEA and ERISA.

Associated Industries of Massachusetts ("AIM") is a non-profit, state-wide organization of over 3000 members. AIM's members employ many workers over the age of forty, and thus its members are directly affected by the precedential implications of the First Circuit's interpretations of the ADEA in this case. AIM's members also include businesspeople and professional persons concerned with the economic impact of judicial decisions affecting the relationship between employers and employees.

Pursuant to Supreme Court Rule 37.2, Amici have obtained consent for the filing of this amicus brief from counsel for the petitioners. Counsel for respondent has not consented, so a motion for leave to file this brief has been filed herewith.

INTRODUCTION

Amici believe the legal issues raised by the Court of Appeals' decision here are of major importance to the nation's businesses and workers and thus warrant review by this Court. The proper relationship between ERISA and ADEA is an unresolved issue that is directly relevant to many cases filed each year throughout the nation. Similarly clarification of the appropriate standard of "willfulness" under the ADEA is crucial to rational decisionmaking in virtually every age discrimination case. So long as these issues remain unresolved, employers, employees and the lower courts will be forced to guess at the applicable rule of law in each ADEA case, a prescription for unnecessary litigation delays, expense and inconsistent decisions with outcomes dependent upon the fortuity of venue.

STATEMENT OF THE CASE

As summarized in the decision below, A. 3-49, the facts relevant to issuance of the writ are simple. Petitioner Hazen Paper Company (Hazen Paper) terminated Respondent Biggins in June of 1986. A. 6. Biggins was then sixty-two years old and was replaced by a younger person. A. 10. Biggins had worked for Hazen Paper for over nine and one-half years and, in "a few more weeks" his right to a pension would have vested. A. 13. Biggins sued Hazen Paper under the ADEA, ERISA and also brought several state law claims.¹

A jury found that Hazen Paper had violated the ADEA by discharging Biggins and that its violation was "willful." A. 6. The jury awarded Biggins over \$560,000 in ADEA damages. *Id.* However, the district court entered a j.n.o.v. on the willfulness finding. A.7, 57-62.

¹ Certiorari is being sought only with regard to the ADEA counts. Pet. i. This amicus brief will therefore address only the ADEA issues.

The Court of Appeals affirmed the finding of an ADEA violation, concluding that the jury could have found age "was inextricably intertwined with the decision to fire Biggins [because] [i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." A. 14. After reviewing decisions from a number of circuits and noting the courts "have had some trouble" in applying the "willfulness" test in disparate treatment cases, A. 15, the court found an adequate evidentiary basis for the "willfulness" finding and reinstated it. A. 14-21. That finding required ADEA damages to be doubled, bringing the total ADEA damages awarded below to more than \$838,000.² A. 23.

² The Court of Appeals reduced the jury's \$560,000 ADEA award to \$419,000 because there was no evidentiary support for the higher figure. A. 22-23.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLATES ERISA AND ADEA LIABILITY AND DISRUPTS A CAREFULLY STRUCK LEGISLATIVE BALANCE.

The Court of Appeals held that the "most significant evidence on the ADEA claim" came from the circumstances surrounding Respondent's (Biggins') termination. A. 13. Indeed, the only fact mentioned in the court's entire discussion of what the jury "could reasonably have found" was that Hazen Paper decided to fire Biggins before his pension vested. A. 14. From that fact, the Court of Appeals inferred the jury could have found that "age was inextricably intertwined with the decision to fire Biggins." *Id.* The basis for that inference was:

If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years. *Id.*

The Court of Appeals' reasoning is flawed. Biggins' pension was about to vest not because of his age, but because of his length of service. If Biggins had been twenty-nine when he was hired, he would have been thirty-nine when he was fired and would have had no ADEA remedy. Ironically, Hazen Paper now faces ADEA liability only because it was willing to hire an older employee.

Congress has, in unambiguous terms, prohibited employers from discharging workers for the purpose of interfering with any right under an employee pension plan and has provided a "carefully integrated civil enforcement scheme" to enforce that and other statutory provisions. See ERISA §§ 502(a), 510, 29 USC §§ 1132(a), 1140; *Ingersoll-Rand Co. v. McClendon*, -- U.S. --, 111 S. Ct. 478, 482 (1990).³ This Court has noted that it is "reluctant to tamper" with that carefully drafted scheme.

³ Indeed, Biggins did bring a claim under section 510 of ERISA, on which he received a \$93,000 judgment. A. 24-25. Petitioners have not sought certiorari on the ERISA claim, which is separate from the ADEA claims on which review is sought. Pet. i.

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

The Court of Appeals' decision plainly conflates two statutes which Congress designed to deal with two related but nonetheless distinct problems.⁴ Under the Court of Appeals' reasoning, since age is always "inextricably intertwined" with length of service and so with pension vesting, every time an employer is found liable for violating section 510 of ERISA in connection with an employee over the age of 40, it automatically becomes liable under the ADEA. The Court of Appeals' decision, in effect, engrafts upon the "carefully integrated" ERISA scheme an *ad hoc* bonus system which rewards some ERISA plaintiffs but not others, precisely the sort of "tampering" of which this Court has disapproved. Given that ADEA cases are the largest single source of the recent explosion in federal employment discrimination litigation,⁵ the Court of Appeals' decision threatens to impose a substantial and capricious new source of liability on the American business community.

The Court of Appeals' decision here also warrants review because it is inconsistent with decisions from a number of other courts which have rejected the First Circuit's reflexive equation of length of service and age. See, e.g., *Wheeldon v. Monon Corp.*, 946 F. 2d 533, 536 (7th Cir. 1991)(the use of pensions as proxies for age should only be on a case-by-case basis); *Pickering v. USX Corp.*, 758 F. Supp. 1460, 1462 (D. Utah 1990); *Harvey v. I.T.W., Inc.*, 672 F. Supp. 973, 975 (W.D. Ky. 1987).⁶

⁴ Senator Javits, the principal Senate sponsor of the ADEA, observed that "the age discrimination law should not be used as the place to fight the pension battle." Hearings on S. 830 Before the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967), cited in Pet. at 19, n.16. The "pension battle" was joined seven years later when Congress enacted ERISA.

⁵ See Donahue and Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 Stan. L. Rev. 983 (1991)(noting that the employment discrimination caseload in the federal courts has increased by 2,166% since 1970).

⁶ But see *White v. Westinghouse Elec. Co.*, 862 F. 2d 56 (3d Cir. 1988)(discharge of employee motivated by desire to avoid increased benefits payable after 30 years' service held to violate ADEA).

More broadly, this case raises the issue of the extent to which an ADEA plaintiff may show bias on the basis of a "proxy," here pension status, as a substitute for age in order to make out a discrimination claim. Although this Court has explicitly held that the ADEA permits use of "neutral criteria not directly dependent on age," EEOC v. Wyoming, 460 U.S. 226, 233 (1983)(emphasis added), the courts of appeals have to date reached divergent results when confronted with ADEA claims based on alleged discrimination involving high salaries and seniority.⁷ Granting the petition here would offer the Court an opportunity to reaffirm that the ADEA bars age discrimination, not employment decisions made coincidentally on the basis of other, neutral criteria which may be weakly correlated with age. Such a ruling would remove uncertainty as to employers' rights and duties under the ADEA. That uncertainty harms employers who, Amici suggest, are not now able to make legitimate personnel decisions without giving undue preference to ADEA-protected employees.

II. THE COURT OF APPEALS' DECISION ON "WILLFULNESS" LIABILITY UNDER THE ADEA CONFLICTS WITH THE VIEWS OF A MAJORITY OF OTHER CIRCUITS AND UNDERMINES THE LOGIC OF THIS COURT'S THURSTON DECISION.

The Court of Appeals' decision to double the ADEA damages due from Hazen Paper pursuant to ADEA §7(b), 29 U.S.C. § 626(b), also warrants the granting of this petition. The court's upholding the jury's "willfulness" finding misreads this Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), and conflicts with the decisions of a clear majority of the other circuits which have recently addressed this issue.

In Thurston, this Court concluded that Congress enacted the double damages provision of section 7(b) in order to create a second, punitive tier

⁷ Compare Bay v. Times Mirror Magazines, Inc., 936 F. 2d 112 (2d Cir. 1991) with Metz v. Transit Mix, Inc., 828 F. 2d 1202 (7th Cir. 1987)(reaching differing results on whether discharge based on salary level alone violates ADEA). See also EEOC v. Clay Printing Co., 955 F. 2d 936 (4th Cir. 1992); Gray v. York Newspapers, Inc., ___ F. 2d ___, 58 Fair Emp. Prac. Cas. 191 (3d Cir. 1992)(holding that seniority is not a valid age proxy for ADEA purposes).

of ADEA liability. Thurston, 469 U.S. at 128-29. The Court held that a "willful" ADEA violation requires a showing that the employer either knew or showed reckless disregard for whether its conduct violated the ADEA. Id. The Court explicitly rejected a rule that a willful violation exists whenever an employer who knew of the applicability of the ADEA to its operations committed age discrimination, because such a rule would lead to "an award of double damages in almost every case." Id. at 128.

Thurston was in substance a disparate impact case. Since Thurston, however, the lower courts have struggled to apply that case's holding to individual discriminatory treatment cases like this one. Unlike the situation in disparate impact cases, in disparate treatment ADEA cases a finding of discriminatory intent is a necessary element of the claim. Thus, as the district court here recognized, "a wooden application of the 'knew or showed reckless disregard' standard" would result in double damages in practically every discriminatory treatment case, despite this Court's express rejection of such a result in Thurston. A. 57-59.

The Court of Appeals here applied Thurston in just such a wooden fashion, adopting this Court's "knew or showed reckless disregard" language "without modification or qualification." A. 20. That court recognized that its decision meant that:

in many cases this will result in a willful violation following hard on the heels of an ADEA violation, but that is the nature of the beast in a disparate treatment case, at least until either the Congress or the Supreme Court changes the definition of willfulness. Id.

The manner in which the First Circuit applied the willfulness standard in this case demonstrates the illogic of its position. The court noted that Mr. Hazen, the owner of Hazen Paper, testified he was "absolutely" aware that age discrimination was illegal. A. 20. The court concluded that this was "as strong evidence of a knowing violation of ADEA as a plaintiff could wish." Id. Accordingly, the First Circuit overturned the district court's j.n.o.v. on liquidated damages and reinstated an additional \$419,000 in "willfulness" liability. A. 21, 23. Of course since virtually every business person in the land knows that age discrimination is illegal, the First Circuit's test shields only liars or fools from double damages in ADEA cases. That is precisely what this Court

in Thurston said was not the law.

The result below was not inevitable. As the Petition demonstrates, Pet. 10-12, seven courts of appeals and a district court in an eighth circuit have all held that a successful discriminatory treatment plaintiff must make some kind of higher showing to double his damages. On the other hand, three circuit courts, in addition to the First Circuit, have indicated they will apply Thurston by its literal terms in discriminatory treatment cases, Pet. 13, n.11. Such an unusually clear division among the circuits, standing alone, strongly suggests certiorari is appropriate here to prevent the results of ADEA cases from turning on the fortuity of the particular circuit in which each case is brought.

There is also a second, related reason why certiorari is appropriate in connection with the application of the "willfulness" requirement. Virtually all of the courts which have attempted to apply Thurston in the individual discriminatory treatment context have recognized the difficulty of that task.⁸ Indeed, even the First Circuit acknowledged that "[t]he courts of appeals have had some difficulty in fitting the Thurston standard of willfulness to disparate treatment cases." A. 15. The consequence of such difficulty is that, in practice, courts confronting essentially identical situations are acting inconsistently in awarding double damages under the ADEA. This is unfair to employers, to employees and to the public interest which always suffers when arbitrariness replaces the rule of law.

⁸ See, e.g., Wheeler v. McKinley Enterprises, 937 F. 2d 1158, 1163 (6th Cir. 1991) (courts have had "some difficulty in finding a definition of 'willfulness'"); Formby v. Merchants Nat'l Bank, 904 F. 2d 627, 631 (11th Cir. 1990) ("precise contours [of willfulness] are . . . difficult to delineate"); Neufeld v. Searle Laboratories, 884 F. 2d 335, 340 (8th Cir. 1989) ("recurring dilemma"); Benjamin v. United Merchants & Manufacturers, Inc., 873 F. 2d 41, 43 (2d Cir. 1989) ("Thurston 'does not resolve the ambiguity' in 'willful'"); Schrand v. Federal Pacific Elec. Co., 851 F. 2d 152, 158 (6th Cir. 1988) ("courts have had difficulty applying [Thurston] to disparate treatment cases"); Cooper v. Asplundh Tree Expert Co., 836 F. 2d 1544, 1548 (10th Cir. 1988) ("Courts have long struggled to define 'willful' under the ADEA."); Lindsey v. American Cast Iron Pipe Co., 810 F. 2d 1094, 1099 (11th Cir. 1987) ("Thurston is 'less helpful in disparate treatment cases'"); Dreyer v. Arco Chemical Co., 801 F. 2d 651, 656 (3d Cir. 1986) ("the courts have struggled with what constitutes a willful violation of the ADEA").

Amici believe that the extreme difficulty which courts have expressed in applying the teaching of Thurston to the very different situation presented by individual discriminatory treatment cases, and the evident split in authority which has developed as the courts have struggled to perform that task, fully warrant the exercise of this Court's power to grant the writ of certiorari prayed for here.

III. BECAUSE THE COURT OF APPEALS' DECISION WILL INCREASE THE NUMBER AND COST OF ADEA CASES AND REQUIRE MULTISTATE EMPLOYERS TO TREAT EMPLOYEES IN DIFFERENT STATES INCONSISTENTLY, THE NEGATIVE IMPACT OF THIS CASE ON BUSINESSES WARRANTS GRANTING THE WRIT.

The decision below means that every plaintiff over the age of 40 who files a claim under §510 of ERISA will routinely add an ADEA count, necessarily increasing such cases' complexity, cost and impact on judicial resources. Moreover, such claims will not be limited to actual damages, but will invariably pursue the windfall of a punitive "willfulness" doubling. Neither American businesses nor the courts should be made to endure the imposition of such harm in the absence of legislative warrant.

That harm will not even have the dubious virtue of being evenly distributed across the country. The division in the courts of appeals ensures there will be a judicial patchwork on the two issues raised by the petition here. Multistate employers will be forced to treat employees in different states differently based on the fortuity of the judicial circuit in which the employee resides or works. That is not fair to employers, nor to employees who are entitled to equitable protection of the law.

The decision below is a paradigm of the perversion of the valid ends of employment discrimination law into a litigation lottery which showers wealth onto a fortunate few plaintiffs and their counsel. Such wealth may come in the first instance from employers, but ultimately it is taken from the businesses they operate and from the economy as a whole.

Unlike ordinary ADEA damages, which provide fair compensation for lost wages, punitive ADEA damages are a windfall. The double "willfulness" damages awarded to a successful ADEA plaintiff represents funds that will not be available for the employer to use to increase the wages of current employees, to purchase new equipment or to return to

stockholders. Similarly, the additional litigation expense that a defendant must incur because it faces the threat of punitive damages represents an irrevocable misallocation of resources into a nonproductive channel.

Amici can find no indication in either of the decisions below of any "willful" intent to discriminate against Biggins on the basis of his age as "willfulness" would normally be understood. The Court of Appeals' decision to reinstate an ADEA award of nearly one million dollars thus is not just a misreading of the statutory text and of Thurston, but it creates a serious new cause of concern to the national business community whose ability to compete in a world marketplace is already far too seriously hampered by the weight of litigation.

IV. CONCLUSION

For the reasons stated above, Amici believe the Court should grant the petition for a writ of certiorari filed by Petitioners.

Respectfully submitted,

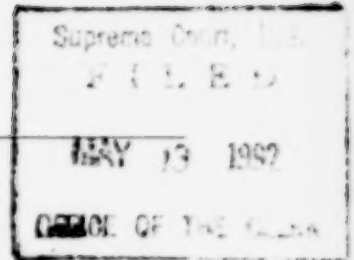
THE NATIONAL ASSOCIATION OF
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May 1, 1992

4
No. 91-1600



**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**OPPOSITION TO MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION
OF MANUFACTURERS AND ASSOCIATED
INDUSTRIES OF MASSACHUSETTS IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

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RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**OPPOSITION TO MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE**

The respondent Walter F. Biggins opposes the Motion for Leave to File a Brief of *Amici Curiae* filed by the National Association of Manufacturers and Associated Industries of Massachusetts (AIM) in support of the petition for a writ of certiorari and as grounds therefore states:

Respondent opposes this motion on grounds first, that the petitioner Hazen Paper Company is a member of AIM and the petitioner Thomas Hazen is, upon information and belief, a member of the Board of Directors of AIM and, therefore, this is not an Amicus Curiae brief of an independent party, but effectively a repetition of the petition itself.

Second, the brief itself does not bring any relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Supreme Court Rule 37.1. In fact, the brief restates essentially the same arguments and points presented by the petitioners.

Respectfully submitted,

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**MOTION FOR LEAVE TO
FILE BRIEF OF AMICI CURIAE**

The National Association of Manufacturers ("NAM") and the Associated Industries of Massachusetts ("AIM") request leave to file the appended amicus brief in support of the petition for a writ of certiorari filed in this case by Petitioners. The two associations are business organizations whose members include nearly all of the largest private employers in Massachusetts and the nation.

NAM's members employ approximately 85% of all workers in the nation's manufacturing sector, including hundreds of thousands of workers over the age of forty whose employment status is affected by the Age Discrimination in Employment Act ("ADEA"), the statute at issue in this case. AIM's members employ a substantial majority of all workers in the Commonwealth of Massachusetts, including tens of thousands of workers whose employment status is affected by the ADEA.

As discussed in the appended brief, NAM and AIM believe the decision of the Court of Appeals in this case makes two highly significant misreadings of the ADEA. NAM and AIM request the opportunity to file the appended amicus brief which discusses those errors of law and explains how and why those errors will, unless corrected by this Court, cause serious injury to American businesses and the ability of American businesses to compete in the world marketplace.

Amici believe that their brief may provide the Court with a perspective on the importance of the issues raised by the petition in this case which may assist the Court in ruling on that petition.

**In The
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October Term, 1991**

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**Petition for Writ of Certiorari to the United States
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Hearings on S. 830 Before the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) 6n

INTEREST OF AMICI

This brief is filed on behalf of the National Association of Manufacturers and the Associated Industries of Massachusetts (the "Amici"). Amici are business organizations whose members and supporters include nearly all of the largest non-governmental employers in Massachusetts and throughout the nation.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association with a membership of approximately 12,000 manufacturing and related businesses. Its members employ approximately 85% of all workers in the nation's manufacturing sector and produce more than 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM's members employ millions of workers over the age of forty whose employment status is affected by the Age Discrimination in Employment Act ("ADEA"). NAM's members likewise provide their employees with a wide range of benefits under benefit plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). NAM and its members are thus directly and significantly affected by judicial interpretations of ADEA and ERISA.

Associated Industries of Massachusetts ("AIM") is a non-profit, state-wide organization of over 3000 members. AIM's members employ many workers over the age of forty, and thus its members are directly affected by the precedential implications of the First Circuit's interpretations of the ADEA in this case. AIM's members also include businesspeople and professional persons concerned with the economic impact of judicial decisions affecting the relationship between employers and employees.

Pursuant to Supreme Court Rule 37.2, Amici have obtained consent for the filing of this amicus brief from counsel for the petitioners. Counsel for respondent has not consented, so a motion for leave to file this brief has been filed herewith.

INTRODUCTION

Amici believe the legal issues raised by the Court of Appeals' decision here are of major importance to the nation's businesses and workers and thus warrant review by this Court. The proper relationship between ERISA and ADEA is an unresolved issue that is directly relevant to many cases filed each year throughout the nation. Similarly clarification of the appropriate standard of "willfulness" under the ADEA is crucial to rational decisionmaking in virtually every age discrimination case. So long as these issues remain unresolved, employers, employees and the lower courts will be forced to guess at the applicable rule of law in each ADEA case, a prescription for unnecessary litigation delays, expense and inconsistent decisions with outcomes dependent upon the fortuity of venue.

STATEMENT OF THE CASE

As summarized in the decision below, A. 3-49, the facts relevant to issuance of the writ are simple. Petitioner Hazen Paper Company (Hazen Paper) terminated Respondent Biggins in June of 1986. A. 6. Biggins was then sixty-two years old and was replaced by a younger person. A. 10. Biggins had worked for Hazen Paper for over nine and one-half years and, in "a few more weeks" his right to a pension would have vested. A. 13. Biggins sued Hazen Paper under the ADEA, ERISA and also brought several state law claims.¹

A jury found that Hazen Paper had violated the ADEA by discharging Biggins and that its violation was "willful." A. 6. The jury awarded Biggins over \$560,000 in ADEA damages.

¹ Certiorari is being sought only with regard to the ADEA counts. Pet. i. This amicus brief will therefore address only the ADEA issues.

Id. However, the district court entered a j.n.o.v. on the willfulness finding. A.7, 57-62.

The Court of Appeals affirmed the finding of an ADEA violation, concluding that the jury could have found age "was inextricably intertwined with the decision to fire Biggins [because] [i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." A. 14. After reviewing decisions from a number of circuits and noting the courts "have had some trouble" in applying the "willfulness" test in disparate treatment cases, A. 15, the court found an adequate evidentiary basis for the "willfulness" finding and reinstated it. A. 14-21. That finding required ADEA damages to be doubled, bringing the total ADEA damages awarded below to more than \$838,000.² A. 23.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLATES ERISA AND ADEA LIABILITY AND DISRUPTS A CAREFULLY STRUCK LEGISLATIVE BALANCE.

The Court of Appeals held that the "most significant evidence on the ADEA claim" came from the circumstances surrounding Respondent's (Biggins') termination. A. 13. Indeed, the only fact mentioned in the court's entire discussion of what the jury "could reasonably have found" was that Hazen Paper decided to fire Biggins before his pension vested. A. 14. From that fact, the Court of Appeals inferred the jury could have found that "age was inextricably intertwined with the decision to fire Biggins." Id. The basis for that inference was:

² The Court of Appeals reduced the jury's \$560,000 ADEA award to \$419,000 because there was no evidentiary support for the higher figure. A. 22-23.

If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years. Id.

The Court of Appeals' reasoning is flawed. Biggins' pension was about to vest not because of his age, but because of his length of service. If Biggins had been twenty-nine when he was hired, he would have been thirty-nine when he was fired and would have had no ADEA remedy. Ironically, Hazen Paper now faces ADEA liability only because it was willing to hire an older employee.

Congress has, in unambiguous terms, prohibited employers from discharging workers for the purpose of interfering with any right under an employee pension plan and has provided a "carefully integrated civil enforcement scheme" to enforce that and other statutory provisions. See ERISA §§ 502(a), 510, 29 USC §§ 1132(a), 1140; Ingersoll-Rand Co. v. McClendon, -- U.S. --, 111 S. Ct. 478, 482 (1990).³ This Court has noted that it is "reluctant to tamper" with that carefully drafted scheme. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

The Court of Appeals' decision plainly conflates two statutes which Congress designed to deal with two related but

³ Indeed, Biggins did bring a claim under section 510 of ERISA, on which he received a \$93,000 judgment. A. 24-25. Petitioners have not sought certiorari on the ERISA claim, which is separate from the ADEA claims on which review is sought. Pet. i.

nonetheless distinct problems.⁴ Under the Court of Appeals' reasoning, since age is always "inextricably intertwined" with length of service and so with pension vesting, every time an employer is found liable for violating section 510 of ERISA in connection with an employee over the age of 40, it automatically becomes liable under the ADEA. The Court of Appeals' decision, in effect, engrafts upon the "carefully integrated" ERISA scheme an ad hoc bonus system which rewards some ERISA plaintiffs but not others, precisely the sort of "tampering" of which this Court has disapproved. Given that ADEA cases are the largest single source of the recent explosion in federal employment discrimination litigation,⁵ the Court of Appeals' decision threatens to impose a substantial and capricious new source of liability on the American business community.

The Court of Appeals' decision here also warrants review because it is inconsistent with decisions from a number of other courts which have rejected the First Circuit's reflexive equation of length of service and age. See, e.g., Wheeldon v. Monon Corp., 946 F. 2d 533, 536 (7th Cir. 1991)(the use of pensions as proxies for age should only be on a case-by-case basis); Pickering v. USX Corp., 758 F. Supp. 1460, 1462 (D. Utah 1990); Harvey v. I.T.W., Inc., 672 F. Supp. 973, 975 (W.D. Ky.

⁴ Senator Javits, the principal Senate sponsor of the ADEA, observed that "the age discrimination law should not be used as the place to fight the pension battle." Hearings on S. 830 Before the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967), cited in Pet. at 19, n.16. The "pension battle" was joined seven years later when Congress enacted ERISA.

⁵ See Donahue and Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 Stan. L. Rev. 983 (1991)(noting that the employment discrimination caseload in the federal courts has increased by 2,166% since 1970).

1987)⁶.

More broadly, this case raises the issue of the extent to which an ADEA plaintiff may show bias on the basis of a "proxy," here pension status, as a substitute for age in order to make out a discrimination claim. Although this Court has explicitly held that the ADEA permits use of "neutral criteria not directly dependent on age," EEOC v. Wyoming, 460 U.S. 226, 233 (1983)(emphasis added), the courts of appeals have to date reached divergent results when confronted with ADEA claims based on alleged discrimination involving high salaries and seniority.⁷ Granting the petition here would offer the Court an opportunity to reaffirm that the ADEA bars age discrimination, not employment decisions made coincidentally on the basis of other, neutral criteria which may be weakly correlated with age. Such a ruling would remove uncertainty as to employers' rights and duties under the ADEA. That uncertainty harms employers who, Amici suggest, are not now able to make legitimate personnel decisions without giving undue preference to ADEA-protected employees.

⁶ But see White v. Westinghouse Elec. Co., 862 F. 2d 56 (3d Cir. 1988)(discharge of employee motivated by desire to avoid increased benefits payable after 30-years' service held to violate ADEA).

⁷ Compare Bay v. Times Mirror Magazines, Inc., 936 F. 2d 112 (2d Cir. 1991) with Metz v. Transit Mix, Inc., 828 F. 2d 1202 (7th Cir. 1987)(reaching differing results on whether discharge based on salary level alone violates ADEA). See also EEOC v. Clay Printing Co., 955 F. 2d 936 (4th Cir. 1992); Gray v. York Newspapers, Inc., ___ F. 2d ___, 58 Fair Emp. Prac. Cas. 191 (3d Cir. 1992)(holding that seniority is not a valid age proxy for ADEA purposes).

II. THE COURT OF APPEALS' DECISION ON "WILLFULNESS" LIABILITY UNDER THE ADEA CONFLICTS WITH THE VIEWS OF A MAJORITY OF OTHER CIRCUITS AND UNDERMINES THE LOGIC OF THIS COURT'S THURSTON DECISION.

The Court of Appeals' decision to double the ADEA damages due from Hazen Paper pursuant to ADEA §7(b), 29 U.S.C. § 626(b), also warrants the granting of this petition. The court's upholding the jury's "willfulness" finding misreads this Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), and conflicts with the decisions of a clear majority of the other circuits which have recently addressed this issue.

In Thurston, this Court concluded that Congress enacted the double damages provision of section 7(b) in order to create a second, punitive tier of ADEA liability. Thurston, 469 U.S. at 128-29. The Court held that a "willful" ADEA violation requires a showing that the employer either knew or showed reckless disregard for whether its conduct violated the ADEA. Id. The Court explicitly rejected a rule that a willful violation exists whenever an employer who knew of the applicability of the ADEA to its operations committed age discrimination, because such a rule would lead to "an award of double damages in almost every case." Id. at 128.

Thurston was in substance a disparate impact case. Since Thurston, however, the lower courts have struggled to apply that case's holding to individual discriminatory treatment cases like this one. Unlike the situation in disparate impact cases, in disparate treatment ADEA cases a finding of discriminatory intent is a necessary element of the claim. Thus, as the district court here recognized, "a wooden application of the 'knew or showed reckless disregard' standard" would result in double damages in practically every discriminatory treatment case,

despite this Court's express rejection of such a result in Thurston. A. 57-59.

The Court of Appeals here applied Thurston in just such a wooden fashion, adopting this Court's "knew or showed reckless disregard" language "without modification or qualification." A. 20. That court recognized that its decision meant that:

in many cases this will result in a willful violation following hard on the heels of an ADEA violation, but that is the nature of the beast in a disparate treatment case, at least until either the Congress or the Supreme Court changes the definition of willfulness. Id.

The manner in which the First Circuit applied the willfulness standard in this case demonstrates the illogic of its position. The court noted that Mr. Hazen, the owner of Hazen Paper, testified he was "absolutely" aware that age discrimination was illegal. A. 20. The court concluded that this was "as strong evidence of a knowing violation of ADEA as a plaintiff could wish." Id. Accordingly, the First Circuit overturned the district court's j.n.o.v. on liquidated damages and reinstated an additional \$419,000 in "willfulness" liability. A. 21, 23. Of course since virtually every business person in the land knows that age discrimination is illegal, the First Circuit's test shields only liars or fools from double damages in ADEA cases. That is precisely what this Court in Thurston said was not the law.

The result below was not inevitable. As the Petition demonstrates, Pet. 10-12, seven courts of appeals and a district court in an eighth circuit have all held that a successful discriminatory treatment plaintiff must make some kind of higher showing to double his damages. On the other hand, three circuit courts, in addition to the First Circuit, have indicated they

will apply Thurston by its literal terms in discriminatory treatment cases, Pet. 13, n.11. Such an unusually clear division among the circuits, standing alone, strongly suggests certiorari is appropriate here to prevent the results of ADEA cases from turning on the fortuity of the particular circuit in which each case is brought.

There is also a second, related reason why certiorari is appropriate in connection with the application of the "willfulness" requirement. Virtually all of the courts which have attempted to apply Thurston in the individual discriminatory treatment context have recognized the difficulty of that task.⁸ Indeed, even the First Circuit acknowledged that "[t]he courts of appeals have had some difficulty in fitting the Thurston standard of willfulness to disparate treatment cases." A. 15. The consequence of such difficulty is that, in practice, courts confronting essentially identical situations are acting inconsistently in awarding double damages under the ADEA. This is unfair to employers, to employees and to the public

⁸ See, e.g., Wheeler v. McKinley Enterprises, 937 F. 2d 1158, 1163 (6th Cir. 1991)(courts have had "some difficulty in finding a definition of 'willfulness'"); Formby v. Merchants Nat'l Bank, 904 F. 2d 627, 631 (11th Cir. 1990) ("precise contours [of willfulness] are . . . difficult to delineate"); Neufeld v. Searle Laboratories, 884 F. 2d 335, 340 (8th Cir. 1989)("recurring dilemma"); Benjamin v. United Merchants & Manufacturers, Inc., 873 F. 2d 41, 43 (2d Cir. 1989) (Thurston "does not resolve the ambiguity" in "willful"); Schrand v. Federal Pacific Elec. Co., 851 F. 2d 152, 158 (6th Cir. 1988)("courts have had difficulty applying [Thurston] to disparate treatment cases"); Cooper v. Asplundh Tree Expert Co., 836 F. 2d 1544, 1548 (10th Cir. 1988)("Courts have long struggled to define 'willful' under the ADEA."); Lindsey v. American Cast Iron Pipe Co., 810 F. 2d 1094, 1099 (11th Cir. 1987)(Thurston is "less helpful in disparate treatment cases"); Dreyer v. Arco Chemical Co., 801 F. 2d 651, 656 (3d Cir. 1986)("the courts have struggled with what constitutes a willful violation of the ADEA").

interest which always suffers when arbitrariness replaces the rule of law.

Amici believe that the extreme difficulty which courts have expressed in applying the teaching of Thurston to the very different situation presented by individual discriminatory treatment cases, and the evident split in authority which has developed as the courts have struggled to perform that task, fully warrant the exercise of this Court's power to grant the writ of certiorari prayed for here.

III. BECAUSE THE COURT OF APPEALS' DECISION WILL INCREASE THE NUMBER AND COST OF ADEA CASES AND REQUIRE MULTISTATE EMPLOYERS TO TREAT EMPLOYEES IN DIFFERENT STATES INCONSISTENTLY, THE NEGATIVE IMPACT OF THIS CASE ON BUSINESSES WARRANTS GRANTING THE WRIT.

The decision below means that every plaintiff over the age of 40 who files a claim under §510 of ERISA will routinely add an ADEA count, necessarily increasing such cases' complexity, cost and impact on judicial resources. Moreover, such claims will not be limited to actual damages, but will invariably pursue the windfall of a punitive "willfulness" doubling. Neither American businesses nor the courts should be made to endure the imposition of such harm in the absence of legislative warrant.

That harm will not even have the dubious virtue of being evenly distributed across the country. The division in the courts of appeals ensures there will be a judicial patchwork on the two issues raised by the petition here. Multistate employers will be forced to treat employees in different states differently based on the fortuity of the judicial circuit in which the employee resides or works. That is not fair to employers, nor to employees who

are entitled to equitable protection of the law.

The decision below is a paradigm of the perversion of the valid ends of employment discrimination law into a litigation lottery which showers wealth onto a fortunate few plaintiffs and their counsel. Such wealth may come in the first instance from employers, but ultimately it is taken from the businesses they operate and from the economy as a whole.

Unlike ordinary ADEA damages, which provide fair compensation for lost wages, punitive ADEA damages are a windfall. The double "willfulness" damages awarded to a successful ADEA plaintiff represents funds that will not be available for the employer to use to increase the wages of current employees, to purchase new equipment or to return to stockholders. Similarly, the additional litigation expense that a defendant must incur because it faces the threat of punitive damages represents an irrevocable misallocation of resources into a nonproductive channel.

Amici can find no indication in either of the decisions below of any "willful" intent to discriminate against Biggins on the basis of his age as "willfulness" would normally be understood. The Court of Appeals' decision to reinstate an ADEA award of nearly one million dollars thus is not just a misreading of the statutory text and of Thurston, but it creates a serious new cause of concern to the national business community whose ability to compete in a world marketplace is already far too seriously hampered by the weight of litigation.

IV. CONCLUSION

For the reasons stated above, Amici believe the Court should grant the petition for a writ of certiorari filed by Petitioners.

Respectfully submitted,

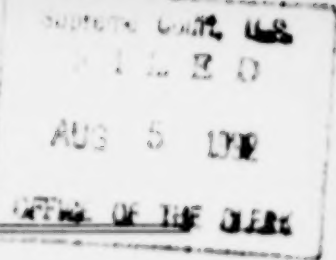
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No. 91-1600



**In the
Supreme Court of the United States**

OCTOBER TERM, 1992

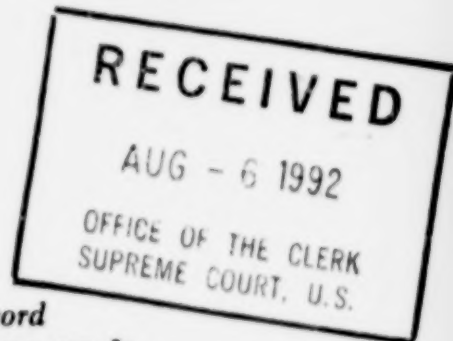
HAZEN PAPER COMPANY, *et al.*,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

**On Writ of Certiorari to the United States Court of Appeals
for the First Circuit**

JOINT APPENDIX



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Certiorari Granted June 22, 1992

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* Appendix to Petition for Writ of Certiorari

DOCKET ENTRIES

Biggins v. The Hazen Paper Company, et al., Civ. No. 88-0025
(U.S. District Court for the District of Massachusetts)

[CAPTION OMITTED]

1988	NR	PROCEEDINGS
Feb. 16	01	COMPLAINT filed; summonses issued; CF and LR 10 to Cl.
Mar. 10		Summons returned w/s/o Defts. The Hazen Paper Company and Thomas Hazen on March 2, 1988 and Deft. Robert Hazen on February 27, 1988.
Mar. 15	02	Appearance of Richard D. Hayes for Ds. filed; CS.
	03	Ds' Motion for Adm. of Patrick McGinley Pro Hac Vice filed; CS.
Mar. 18	04	P's Notices of Depositions of Thomas Hazen and Robert Hazen filed; CS.
	05	Ds' ANSWER filed; CS.
Mar. 21		REF. TO MAG. FOR RULE 16 CONFERENCE.
**Mar. 17		FREEDMAN, C.J.: #03 ALLOWED; cc/cl.
June 1	06	PONSOR, USM: PRETRIAL SCHEDULING ORDER entered. P's Motion to Amend Complaint to be filed by June 17, 1988. Defts. have 2 weeks after receipt of the motion to file their opposition, if any. DISCOVERY to Close December 21, 1988.
June 15	07	P's Notice of Deposition of Frederick L. Sullivan filed; CS; S.I.
June 17	08	P's Motion to Amend Complaint filed w/Brief; CS.
July 1	09	Ds' Opposition to #08 filed; CS.
July 6		PONSOR, USM: #08 ALLOWED; amended complaint to be filed within 20 days.
July 26	10	AMENDED COMPLAINT filed; CS.

1988	NR	PROCEEDINGS
Aug. 3	11	Ds' ANSWER to AMENDED COMPLAINT filed; CS.
Aug. 12	12	Ds' Notice of Deposition of Pl. filed; CS.
	13	Ds' Motion to Compel Discovery filed w/Cert. of Consultation; CS.
Aug. 30		PONSOR, USM: #13 ALLOWED, without opposition; suppl. responses to be served by September 23, 1988.
Sept. 23	14	P's Motion for Reconsideration of allowance of #13 filed; CS.
Sept. 28	15	D's Opposition to #14 filed; CS.
	16	P's Motion for Leave to File Memorandum in Support of #14 filed; CS.
Oct. 3		PONSOR, USM: #16 ALLOWED.
	17	P's Memorandum in Support of #14 filed; CS. PONSOR, USM: #14 is DENIED; suppl. responses to be served by October 28, 1988.
Nov. 16	18	Ds' Motion to Enforce Sanctions and for Fees filed w/Memorandum; CS.
Dec. 21	19	Stipulated P's Motion to Ext. Discovery to January 31, 1989 for Hutchinson dep. filed; CS.
Dec. 22		PONSOR, USM: #19 ALLOWED.
Dec. 23	20	P's Motion for Leave to Serve Addtl. Ints. filed; CS.
1989		
Jan. 3	21	Ds' Opposition to #20 filed; CS.
Jan. 4		PONSOR, USM: #20 DENIED.
Jan. 6	22	P's Motion to Compel Production filed w/Cert. of Consultation; CS.
Jan. 13	23	P's Notice of Deposition of Robert Hutchinson filed; CS.
Jan. 18	24	Ds' Resp. to #22 filed; CS.
Jan. 19		PONSOR, USM: #22 DENIED, on condition that Def. produce suppl. documents within 30 days.

1989	NR	PROCEEDINGS
Jan. 31	25	P's Motion to Reconsider denial of #22 and to seek to renew filed; CS.
Feb. 9	26	Ds' Response to #25 filed. CS.
Feb. 10		PONSOR, USM: #25 DENIED.
Feb. 22	27	Parties Stipulation and Order filed.
Feb. 23	28	PONSOR, USM: FURTHER PRETRIAL SCHEDULING ORDER entered. ALL DISCOVERY IS CLOSED; with the exception of motions to compel, and expert discovery. PONSOR, USM: #27 ALLOWED.
Feb. 27	29	P's Motion to Reconsider the Magistrate's Denial of #25 filed w/Brief; CS.
Mar. 6	30	Ds' Resp. to #29 filed; CS.
Mar. 9	31	P's Motion for Leave to File Reply Brief filed; CS.
Mar. 30		FREEDMAN, C.J.: #31 ALLOWED; cc/cl.
	32	P's Reply Brief filed; CS.
May 11	33	FREEDMAN, C.J.: MEMORANDUM AND ORDER entered. P's Motion to Reconsider the Magistrate's Discovery order is DENIED; cc/cl.
May 26	34	P's Notice of Deposition of Lester Halpern filed; CS. Subpoena issued.
May 31	35	P's Renewed Motion to Compel Production and for Sanctions filed; CS.
June 8	36	P's Motion to Compel Compliance with Subpoena and for Sanctions filed; CS.
	37	Ds' Resp. to #35 filed; CS.
June 15	38	P's Brief in Support of #35 filed w/Affidavit of Maurice M. Cahillane; CS.
June 21	39	Notice of Appearance of Jo-Ann W. Davis as co-counsel for Ds. Hazen Paper Company, Robert Hazen and Thomas Hazen filed; CS.
	40	Ds' Resp. to #36 filed; CS.
June 29	41	P's Brief in Support of #36 filed; CS.
Aug. 16		PONSOR, USM: #35 DENIED, no sanctions. PONSOR, USM: #36 ALLOWED: Halpern

1989	NR	PROCEEDINGS
		deposition to be taken by September 30, 1989. DISCOVERY otherwise is CLOSED; no sanctions.
Aug. 23	42	Ds' Motion to Ext. Time to Complete Discovery of Expert Witness filed w/Cert. of Consultation; CS.
Sept. 1	43	P's Opposition to #42 filed; CS. PONSOR, USM: #42 ALLOWED: EXPERT DISCOVERY ext. to October 31, 1989.
Sept. 11	44	PONSOR, USM: (CLERK'S NOTES) Status Conference held. Further Scheduling Order to issue. Final Pretrial Conference set for February 13, 1990 at 3:00 P.M.
Sept. 12	45	PONSOR, USM: PRETRIAL SCHEDULING ORDER entered. Plft. has until January 31, 1990 to depose experts. Counsel to appear for Final Pretrial Conference on February 13, 1990 at 3:00 P.M. This matter is set for Jury Trial before Chief Judge Frank Freedman on April 24, 1990.
1990		
Jan. 19	46	P's Notice of Deposition of Charles E. Sullivan filed; CS; S.I.
Feb. 8	47	PONSOR, USM: Notice of Pretrial Conference on March 2, 1990 at 2:00 P.M. entered by the Court.
	48	Ds' Pretrial Memorandum filed; CS.
	49	Notice of Appearance of Charles S. Cohen for the Plft. filed; CS.
Feb. 27	50	Ds' Amended Pretrial Memorandum filed; CS.
Feb. 28	51	P's Pretrial Memorandum filed; CS.
Mar. 2	52	PONSOR, USM: (CLERK'S NOTES) PRETRIAL CONFERENCE held.
Mar. 5	53	PONSOR, USM: FURTHER SCHEDULING ORDER entered: Ds' motion for S/J due March 23, 1990; P's opposition due April 13, 1990; mo-

1990	NR	PROCEEDINGS
		tion will then be taken under advisement; JURY TRIAL — April 24, 1990.
Mar. 9	54	D's Motion to Ext. Trial Date filed w/Hazen and McGinley Affidavits; CS.
	55	Affidavit of Jo-Ann W. Davis in Support of #54 filed.
Mar. 15	56	P's Opposition to #54 filed w/Biggins Affidavit; CS.
Mar. 20	57	Ds' Motion for Leave to File Brief in Excess of 20 Pgs. filed; CS.
Mar. 23		FREEDMAN, C.J.: #57 DENIED; cc/cl. The Court will consider no more than thirty (30) pages.
Mar. 26	58	Ds' Motion for S/J filed w/LR 18 Statement and Memorandum; CS.
April 9	59	Ds' Motion for Leave to File Reply to P's Opposition to #58 filed; CS.
April 12		FREEDMAN, C.J.: #54 ALLOWED; cc/cl. FREEDMAN, C.J.: #59 ALLOWED; cc/cl.
April 13	60	P's Motion for Leave to File Brief in Excess of Limit filed; CS. FREEDMAN, C.J.: #60 ALLOWED; cc/cl.
	61	P's Brief in Opposition to #58 filed; CS.
	62	P's Statement under LR 18 in Support of #61 filed; CS.
	63	P's Exhibits in Support of #61 filed; CS.
April 17	64	Ds' Amended Motion to File a Brief in Reply to #61 filed; CS.
May 11		FREEDMAN, C.J.: #64 ALLOWED; cc/cl.
	65	Ds' Brief in Reply to #61 filed; CS.
	66	Ds' Motion to have admitted all of Ds' Local Rule 18 Statements of Undisputed Facts filed; CS.
	67	Ds' Motion to Strike Portions of Affidavit of Walter Biggins accompany[ing] Local Rule 18 Statement filed; CS.

1990	NR	PROCEEDINGS
May 25	68	FREEDMAN, C.J.: Notice of Hearing on Defendant's Motion for S/J on June 8, 1990 at 10:00 A.M. entered by the Court; cc/cl.
	69	P's Opposition to #66 filed; CS.
	70	P's Opposition to #67 filed; CS.
	71	P's Brief in Support of ##69 and 70 filed; CS.
June 1	72	P's Motion for Leave to File Reply Brief filed; CS.
June 4		FREEDMAN, C.J.: #72 ALLOWED; cc/cl.
	73	P's Reply Brief in Opposition to #58 filed; CS.
June 8	74	FREEDMAN, C.J.: (CLERK'S NOTES) HEARING on D's Motion for S/J; after hearing, motion is DENIED; D's motion to strike affidavit is DENIED; D's motion for admission of LR 18 statement is DENIED. TRIAL DATE set for July 16, 1990 at 10:00 A.M. (Reporter: Mitchell)
July 3	75	Def. Hazen Paper's Offer of Judgment in the sum of \$50,000 filed w/McGinley Affidavit; CS.
July 10	76	Ds' Motion in Limine re Calculation of Damages by Special Master filed w/Memorandum; CS.
July 11	77	P's Motion for View filed w/Memorandum; CS.
	78	P's Motion in Limine to Exclude Evidence of Prior Litigation filed w/Memorandum; CS.
	79	P's Motion in Limine to Exclude Evidence of Prior Employment filed w/Memorandum; CS.
July 13	80	P's Opposition to #76 filed w/Memorandum; CS.
		FREEDMAN, C.J.: #77 DENIED; cc/cl.
	81	D's Opposition to #78 filed. CS.
	82	D's Motion to Quash Subpoenas to Shirley Rossmeissel, Dennis Badger and Lester Halpern filed. CS.

1990	NR	PROCEEDINGS
July 16	83	Ds' Proposed Jury Instructions Re: measure of damages filed; CS.
	84	Ds' Req. for the Submission of Special Ints. to the Jury re: proposed jury instructions filed; CS.
	85	Ds' Proposed Jury Instructions re: liability filed; CS.
	86	P's Proposed Jury Instructions filed.
	87	Jury Questionnaire filed.
	88	FREEDMAN, C.J.: First Day — Case called for jury trial. Court rules on pre-trial motions. Jury of six and two impaneled and sworn. P's opening statement. Ds' opening statement. Witnesses not present but subpoenaed should appear on July 17, 1990. Court recesses at 3:30 P.M. until July 17, 1990 at 10:00 A.M. (Mitchell)
July 17		FREEDMAN, C.J.: 2nd Day — P's evidence continues. Court recesses at 4:00 P.M. until 10:00 A.M. on July 18, 1990. (Mitchell)
July 18	89	Ds' Motion for Directed Verdict filed; CS.
		FREEDMAN, C.J.: 3rd Day — P's evidence continues. Pltf. rests. Defts. move for directed verdict. Motion denied. Defts. evidence begins. Court recesses at 4:00 P.M. until July 19, 1990 at 10:00 A.M. (Mitchell)
July 19		FREEDMAN, C.J.: 4th Day — Defts. evidence continues. Defts. rest. Defts. renew motion for directed verdict. Motion denied. Court recesses at 3:15 P.M. until 9:30 A.M., July 20, 1990. (Mitchell)
July 20		FREEDMAN, C.J.: 5th Day — Closing arguments of counsel. Court's instructions on the law. Counsel's objections to Court's instructions. Jury begins deliberations at 11:54 A.M. Court re-instructs jury on age discrimination claim at 1:45 P.M. Jury returns verdict at 3:30

1990	NR	PROCEEDINGS
		P.M. Jury finds for the Plaintiff on all claims and awards total damages of \$1,242,772.00. Jury discharged. Exhibits returned to counsel.
	90	Special Verdict Questions filed.
July 26	91	P's Motion to Assess Liquidated Damages in Calculation of Judgment filed w/Memorandum. CS.
July 31	92	Ds' Opposition to #91 filed; CS.
Aug. 7	93	P's Motion for Leave to File Reply Brief filed; CS.
Aug. 9		FREEDMAN, C.J.: #93 ALLOWED; cc/cl.
	94	P's Reply Brief to #92 filed; CS.
Aug. 14	95	D's Motion for Leave to File Reply Brief in Opposition to #91 filed; CS.
Aug. 16		FREEDMAN, C.J.: #95 ALLOWED. cc/cl.
	96	D's Reply Brief filed. CS
Aug. 24	97	FREEDMAN, C.J.: MEMORANDUM AND ORDER entered. The Court GRANTS Plaintiff's Motion for Liquidated Damages in the sum of \$560,775.00. The Court ORDERS the clerk to enter judgment in favor of plaintiff consistent with the jury's verdict and today's Memorandum and Order. The Clerk shall allot no interest on the ADEA awards; cc/cl.
Aug. 27	98	JUDGMENT for the Plaintiff on his claim of age discrimination with damages awarded in the amount of \$560,775.00. JUDGMENT for the Plaintiff with liquidated damages awarded by the Court of \$560,775.00, based on the jury's finding of "Willfulness". JUDGMENT for the Plaintiff on his claim under ERISA with damages awarded in the amount of \$100,000.00. JUDGMENT for the Plaintiff on his claim of wrongful discharge and fraud with damages awarded in the amount of \$315,099.00.

1990	NR	PROCEEDINGS
		JUDGMENT for the Plaintiff on his claim of interference with his civil rights under Massachusetts Law with damages awarded in the amount of \$1.00.
		JUDGMENT for the Plaintiff on his claim of breach of the employment contract with damages awarded in the amount of \$266,897.00.
		INTEREST, computed at 12% on Plaintiffs' awards on his claims of wrongful discharge, fraud, state civil rights and breach of contract amounts to \$176,703,84, making a total award on these claims of \$758,699.84.
		INTEREST, computed at 7.88%, on plaintiff's claim under ERISA, amounts to \$19,937.51, making a total award on this claim of \$119,937.51.
		JUDGMENT for the Defendants on Plaintiff's request for a declaratory Judgment and his claim of conversion entered; cc/cl.
Aug. 31	99	D's Motion to Stay Execution of Judgment pending disposition of D's Motion for Judgment notwithstanding the verdict or new trial filed; CS.
Sept. 11	100	Transcript of hearing on Motion for S/J on June 8, 1990 before Judge Freedman filed.
	101	Transcript of Jury Trial held August 20, 1990 before Judge Freedman filed.
Sept. 11	102	Ds' Motion to Alter or Amend Judgment filed w/Memorandum; CS.
	103	Ds' Motion for Judgment Notwithstanding the Verdict or for a New Trial filed; CS.
	104	Ds' Brief in Support of Motion for a New Trial filed; CS.
	105	Ds' Brief in Support of Motion for Judgment

1990	NR	PROCEEDINGS
		Notwithstanding the Verdict filed; CS.
Sept. 13	106	P's Opposition to 99 filed; CS.
Sept. 21	107	Ds' Motion to File a Brief in Reply to #106 and to Impound Financial Information attached to, and referenced in brief filed; CS.
Sept. 25		FREEDMAN, C.J.: #107 ALLOWED; cc/cl.
	108	Transcript of Trial held before Chief Judge Frank H. Freedman on July 16, 1990 at 10:00 A.M.
	109	P's Opposition to #102 filed; CS.
	110	P's Opposition to #103 (Motion for New Trial) filed; CS.
	111	P's Opposition to #103 (Judgment not withstanding the Verdict) filed; CS.
Sept. 26	112	D's Reply Brief in response to #106 filed; C[S].
	113	P's Motion for Fees and Costs filed w/Egan, Sikorski, Blakesley and Biggins Affidavits; CS.
	114	P's Memorandum in Support of #113 filed; CS.
Oct. 1	115	P's Request for Execution filed.
	116	P's Motion for Leave to file Resp. to #112 filed; CS.
Oct. 2	117	Ds' Motion to file Briefs in Reply to #'s 110 & 111 filed; CS.
Oct. 5		FREEDMAN, C.J.: #117 ALLOWED; cc/cl.
Oct. 10	118	Ds' Opposition to #113 filed; CS.
Oct. 12	119	Transcript of Trial held before Chief Judge Freedman filed.
Oct. 17	120	P's Motion for Leave to file Reply Brief to #118 filed; CS.
Oct. 19		FREEDMAN, C.J.: #120 ALLOWED; cc/cl.
	121	P's Reply to #118 filed w/Suppl. Affidavit of John J. Egan; CS.
Oct. 24	122	Ds' Brief in Reply to #111 filed; CS.
	123	Ds' Reply to #109 filed; CS.
Oct. 23	124	Ds' Brief in Reply to #110 filed; CS.

1990	NR	PROCEEDINGS
Oct. 25		PONSOR, USM: #116 ALLOWED; cc/cl.
	125	P's Resp. to #112 and in Support of #106 filed; CS.
Oct. 31	126	D's Motion for Leave to File Resp. to #125 filed; CS.
Nov. 1		FREEDMAN, C.J.: #126 ALLOWED, cc/cl.
	127	Ds' Resp. to #125 filed; CS.
Nov. 2	128	Transcript of trial held July 18, 1990 before Chief Judge Frank Freedman and a jury filed.
	129	P's Motion for Leave to file Reply Brief filed; CS.
Nov. 5		FREEDMAN, C.J.: #129 ALLOWED with the provision that no additional papers will be accepted on behalf of either side of the litigation; cc/cl.
	130	P's Reply Brief to #103 filed; CS.
Nov. 6	131	FREEDMAN, C.J.: MEMORANDUM AND ORDER entered. The Court DENIES defendants' motion for an unsecured stay of execution of judgment pending disposition of defendants' post-trial motions. The Court hereby ORDERS the Clerk to issue the execution; cc/cl.
		EXECUTION issued. Original to Counsel.
Nov. 7		AMENDED EXECUTION issued. Original to Counsel.
Nov. 16	132	Transcript of Trial held before Chief Judge Frank H. Freedman filed.
Dec. 10	133	Transcript of Trial held before Chief Judge Frank H. Freedman filed. (Opening statements)
1991		
Jan. 8	134	Supersedeas Bond filed.
Jan. 16	135	Ps' Motion to Increase Supersedeas Bond filed; CS.

1991 NR PROCEEDINGS

Jan. 17 136 P's Memorandum in Support of #135 filed; CS.

April 5 137 Ds' Opposition to #135 filed; CS.

April 5 138 FREEDMAN, C.J.: MEMORANDUM AND ORDER entered. The Court GRANTS Ds' motion for judgment notwithstanding the verdict on the question of liquidated damages and on count VIII, and DENIES the motion for judgment notwithstanding the verdict or new trial in all other respects; DENIES Ds' motion to alter or amend the judgment; GRANTS P's motion for attorney's fees in the amount of \$175,564.57, and for costs in the amount of \$9,760.07 and DENIES P's motion to increase the amount of the bond. The Clerk is hereby ORDERED to enter judgment in accordance with this Memorandum and Order, and to award prejudgment interest on the entire award at the appropriate rates; cc/cl.

April 12 139 AMENDED JUDGMENT entered pursuant to the Memorandum and Order of the Court entered on April 5, 1991 and the Special Verdict of the Jury. JUDGMENT for the Pltf. on the claim of age discrimination with damages awarded in the amount of \$560,775.00. Interest, computed at the T-Bill rate of 6.46% amounts to \$114,313.43. Total award — \$675,088.43. JUDGMENT for the Pltf. on the ERISA Claim with damages awarded in the amount of \$100,000.00. Interest, computed at the T-Bill rate of 6.46% amounts to \$20,384.77. Total award — \$120,384.77. JUDGMENT for the Pltf. on claims of wrongful discharge and fraud with damages awarded in the amount of \$315,099.00. JUDGMENT for the Pltf. on Claim of Breach of Contract

with damages awarded the amount of \$266,897.00. Interest, computed at the rate of 12% on claims of wrongful discharge, fraud and breach of contract, amounts to \$220,382.52. Total award on these claims — \$802,378.52. JUDGMENT for the Ds' on P's claim for Liquidated damages. JUDGMENT for Ds' on P's claim of Interference with Civil Rights. JUDGMENT for Ds' on P's request for Declaratory Judgment and his claim of conversion. JUDGMENT for the Pltf. with attorney's fees of \$175,564.57 and costs of \$9,760.07 entered; cc/cl.

April 24 140 Ps' Motion for Reconsideration of #138 failed; CS.

April 26 141 Ps' Memorandum in Support of #140 filed; CS.

April 26 142 Ds' Motion for Leave to Reduce Supersedeas Bond Amount filed; CS.

143 Ds' Joint Notice of Appeal filed. Copy sent to All Counsel. Filing fee of \$105.00 paid.

April 29 Original File and docket sent to Appeals Clerk.

May 6 Certified copy of docket and original pleadings forwarded to USCA on clerks cert. this date.

May 7 144 P's Notice of Cross Appeal filed; CS. Filing fee of \$105.00 not paid. Copy sent to all counsel. Original to Court of Appeals.

145 Ds' Opposition to #140 filed; CS.

May 8 Clerk's Certificate re: #144 received.

May 10 Filing Fee of \$105.00 paid re: #144.

May 14 Clerk's Cert. dated May 9, 1991 re #145 and Exhibits.

May 28 FREEDMAN, C.J.: #142 ALLOWED; cc/cl.

June 13 146 FREEDMAN, C.J.: MEMORANDUM AND ORDER entered. The Court DENIES P's Motion for Reconsideration (#140); cc/cl.

June 17 147 Dft's joint Notice of Appeal, filed.

1991 NR PROCEEDINGS

Original documents #138, 140, 145, and 146 forwarded to USCA on supplemental cert.

June 19 - Certified copy of docket and original Notice of Appeal #147, forwarded to USCA this date.

June 21 148 P's Notice of Cross-Appeal filed. CS. Fee paid. #148 forwarded to Appeals Clerk, Boston. Copy sent to counsel.

July 1 ORDER of First Circuit entered June 3, 1991: appeals dismissed for lack of jurisdiction.

149 MANDATE issued June 25, 1991.

1992

Feb. 6 150 P's Supplemental Application for Award of fees and costs for post-judgment, pre-appeal services filed; CS.

151 P's Memorandum in Support of #150 filed; CS.

152 ORDER OF COURT OF APPEALS entered January 8, 1992 . . . The Judgment of the district court is **AFFIRMED IN PART** and **REVERSED IN PART** and is **REMANDED** to the district court for further proceedings. **MANDATE** issued.

Feb. 20 153 Ds' Resp. in Opposition to # 150 filed; CS.

Mar. 5 154 ORDER OF COURT OF APPEALS entered . . . The mandate is amended by adding the following: the district court is instructed to compute prejudgment interest from August 27, 1990, the date of the district court's initial judgment. **MANDATE** is reissued.

Mar. 13 155 P's Motion for Leave to file Reply Brief filed; CS.

Mar. 18 **FREEDMAN, S.J.**: #155 **ALLOWED**: cc/cl.

156 P's Reply Brief to #153 filed; CS.

Mar. 19 157 ORDER of First Circuit Court of Appeals: Clerk is requested to add to mandate the amount of appellate attorney's fees in the amount of \$71,798.50 to Pl.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 911591

WALTER F. BIGGINS,
PLAINTIFF, APPELLEE,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLANTS.ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Dismissed: 91-1416, 91-1440, 91-1614

NO. BELOW: CA 88-00025

JUDGE BELOW: FREEDMAN, CH. J. (0114)

DATE OF JUDGMENT: AUGUST 27, 1990;

ORDERS: APRIL 5, 1991,
JUNE 13, 1991NOTICE OF APPEAL FILED: JUNE 17, 1991
[CIVIL RIGHTS]

ATTORNEYS FOR APPELLANT

John M. Harrington, Jr., Esq., Robert B. Gordon, Esq., Ropes & Gray,
One International Place, Boston, MA 02110; (617) 951-7000

ATTORNEYS FOR APPELLEE

John J. Egan, Esq., Egan, Flanagan & Cohen, P.C., 67 Market Street, P.O.
Box 9035, Springfield, MA 01102-9035; (413) 737-0260Maurice M. Cahillane, Esq., Egan, Flanagan & Cohen, P.C., 67 Market
Street, P.O. Box 9035, Springfield, MA 01102-9035; (413) 737-0260

1991

FILINGS-PROCEEDINGS

June 24 Notice of appeal and district court docket entries
received and filed. Case docketed and notices sent.
(See record filed in companion cases.)(db)

1991
 June 28 Appearance of John J. Egan, Esq. and Maurice M. Cahillane, Esq. for the plaintiff, appellee received and filed. (jm)
 June 28 Defendants-Appellants' Designation of Contents of Appendix and Statement of Issues, received and filed. (jm)
 June 28 Appearance of John W. Harrington, Esq., and Robert B. Gordon, Esq., for defendants/appellants, received and filed. (rm)
 June 28 Motion filed. Order: (Selya, J.) leave is granted the parties to proceed under F.R.A.P. 28(h) with defendants designated as appellants. Defendants' brief shall remain due July 29, 1991. Plaintiff may have 30 days to file his brief as appellee/cross-appellant; defendants may have 30 days thereafter to file their brief as cross-appellees and in reply as appellants. Cross-appellant's reply brief should be filed 10 days thereafter. Notices mailed. (rm)
 July 2 Brief and 6 volumes of appendix of appellant received and filed. Notices mailed. (bf)
 July 18 Order: (Cyr, J.) To show cause why these appeals should not be dismissed by August 1, 1991. Notices mailed. (eml)
 July 23 Parties' Joint Response To Order of Court Dated July 18, 1991, received and filed. (db)
 Aug. 1 Brief of plaintiff/appellee/cross-appellant Walter F. Biggins received and filed. (bf)
 Aug. 30 Reply brief for defendant/appellants and brief of cross/appellant, Hazen Paper Co., received and filed. (db)
 Sept. 9 Reply brief of the plaintiff/appellee/cross-appellant Walter F. Biggins received and filed. (bf)
 Sept. 11 Motion to strike portion of reply brief of the plaintiff/appellee/cross-appellant Walter F. Biggins, received and filed. (rm)

1991
 Sept. 16 Opposition to motion to strike portion of reply brief and alternative motion for leave to file reply brief, received and filed. (rm)
 Sept. 19 Assigned for hearing at the October, 1991 session. (cm)
 Sept. 20 ORDER: (Torruella, J.) In view of the parties' response to this court's show cause order, these appeals may proceed in normal course. No final jurisdictional ruling is made at this time, but rather the matter is reserved for consideration by the panel hearing the merits of the appeals. Notices mailed. (db)
 Oct. 1 Order: (Torruella, J.) Defendants' objections to plaintiff's reply brief are noted. The motion to strike is denied without prejudice to reconsideration by the panel deciding the merits of the appeal. Notices mailed. (rm)
 Oct. 11 Heard before Torruella, Bownes, Tauro, JJ. (cm)
 1992
 Jan. 8 Judgment: The judgment of the district court is affirmed in part and reversed in part and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date. No costs to either party. Opinion of the Court by Bownes, J. Notices mailed. (rm)
 Jan. 21 Petition of defendants/appellants/cross-appellees for rehearing and suggestion for rehearing *in banc*, received and filed. (rm)
 Jan. 22 Plaintiff/appellee/cross-appellant's petition for rehearing and for rehearing *en banc*, received and filed. (rm)
 Jan. 29 Order: (Breyer, Ch. J. Bownes, Torruella, Selya, Cyr and Tauro, JJ.) Denying the petition for rehearing and suggestion for rehearing *en banc*. Notices mailed. (rm)

1992

FILINGS-PROCEEDINGS

- Feb. 6 Mandate issued, copy filed. Original papers returned to district court. Notices mailed. (rm)
- Feb. 10 Application of plaintiff (appellee/cross-appellant) for award of attorneys' fees and costs, received and filed. (rm)
- Feb. 10 Memorandum of plaintiff (Appellee/cross-appellant) in support of application for attorney's fees and costs, received and filed. (rm)
- Feb. 13 Opposition to plaintiff/appellee/cross-appellant's application for award of attorney's fees and costs, received and filed. (rm)
- Feb. 19 Plaintiff's motion to recall and amend mandate to clarify instructions respecting the allowance of interest, received and filed. (rm)
- Feb. 19 Memorandum in support of plaintiff's motion to recall mandate, received and filed. (rm)
- Feb. 24 Defendants-appellants' opposition to plaintiff's motion to recall and amend mandate, received and filed. (rm)
- Feb. 26 Order: (Bownes, J.) Plaintiff is entitled to appellate attorney's fees on the ADEA claim and the ERISA claim only. Plaintiff is also advised that this court will follow the district court and approve attorney's fees for partners in the amount of \$165 per hour and paralegals at the rate of \$50 per hour. The hourly fees for associates and junior associates should also be reduced accordingly. Finally, we advise plaintiff that no costs will be allowed. The plaintiff did not entirely prevail on appeal, and in this circuit, we usually do not allow costs in a case where there has been mixed results and the defendant has also prevailed on some important issues for reasons stated in said order. Notices mailed. (rm)
- Mar. 2 Plaintiff's reply to defendants' opposition to plaintiff's motion to recall and amend mandate, received and filed. (rm)

1992

FILINGS-PROCEEDINGS

- Mar. 5 Order: (Torruella, Bownes and Tauro, JJ.) The mandate in this case, which was issued on February 6, 1992, is constructively recalled. The mandate is amended by adding the following: "The district court is instructed to compute post-judgment interest from August 27, 1990, the date of the district court's initial judgment." Mandate is constructively reissued. Notices mailed. (rm)
- Mar. 10 Amended application of plaintiff (appellee/cross-appellant) for award of attorney's fees and costs, received and filed. (rm)
- Mar. 11 Defendant/appellants' response to plaintiff/appellee's amended application for attorney's fees and costs, received and filed. (rm)
- Mar. 19 Order: (Bownes, J.) We find that plaintiff's attorneys have satisfactorily complied with our order of February 26, 1992, in all respects except one. We do not think there has been an adequate reduction in the hours billed by attorneys Egan and Cahillane for writing the appellate brief. We award the plaintiff \$71,798.50 for appellate attorney's fees for reasons stated in said order. Notices mailed. (rm)
- Mar. 19 Order: (Torruella, Bownes and Tauro, JJ.) The clerk of the district court is requested to add to this court's mandate the amount of appellate attorney's fees in the amount of \$71,798.50 to the plaintiff. Notices mailed. (rm)
- April 9 Notification of filing Petition for Writ of Certiorari on April 3, 1992, October 1991 Term, Supreme Court No. 91-1600, received and filed in Case Nos. 91-1591 and 91-1614. (db)

1992

FILINGS-PROCEEDINGS

- May 18 Notification of filing petition for writ of certiorari on April 30, 1992, Supreme Court Case Number 91-1818, October 1991 Term, received and filed. (db)
- June 25 Supreme Court Order dated June 22, 1992, allowing petition for certiorari in Court of Appeals No. 91-1591 and 91-1614, received and filed. (db)

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 911614

WALTER F. BIGGINS,
PLAINTIFF, APPELLANT,

v.

THE HAZEN PAPER COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Comp. to 91-1591

No. BELOW: CA 88-00025

JUDGE BELOW: FREEDMAN, J. (0114)

DATE OF ORDER: APRIL 12, 1991; JUDGMENT: APRIL 1991;

ORDER: JUNE 13, 1991

NOTICE OF APPEAL FILED: JUNE 21, 1991

[CIVIL RIGHTS]

ATTORNEYS FOR APPELLANT

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John J. Egan, Esq., Egan, Flanagan & Cohen, P.C., 67 Market Street, P.O. Box 9035, Springfield, MA 01102; (413) 737-0260

ATTORNEYS FOR APPELLEE

John M. Harrington, Jr., Esq., Robert B. Gordon, Esq., Ropes & Gray, One International Place, Boston, MA 02110-2624; (617) 951-7000

1991

FILINGS-PROCEEDINGS

- June 28 Supplemental certificate consisting of notice of appeal and district court docket entries received and filed. Case docketed. Notices mailed. (lb) (See record previously filed in companion case.)

1991

FILINGS-PROCEEDINGS

- June 28 Motion filed. Order: (Selya, J.) Leave is granted the parties to proceed under F.R.A.P. 28 (h) with defendants designated as appellants. Defendants' brief shall remain due July 29, 1991. Plaintiff may have 30 days to file his brief as appellee/cross-appellant; defendants may have 30 days thereafter to file their brief as cross-appellees and in reply as appellants. Cross-appellant's reply brief should be filed 10 days thereafter. Notices mailed. (rm)
- July 2 Appearance of John M. Harrington, Jr., Esq. and Robert B. Gordon, Esq. for the appellees, received and filed. (eml)
- July 2 Brief and 6 volumes of appendix of appellant received and filed. Notices mailed. (bf)
- July 8 Appearance of Maurice M. Cahillane, Esquire, for appellant, received and filed. (pm)
- July 8 Appearance of John J. Egan, Esquire, for appellant, received and filed. (pm)
- July 8 Plaintiff/appellee/cross-appellant's designation of the record appendix and statement of issues, received and filed. (eml)
- July 18 Order: (Cyr, J.) To show cause why these appeals should not be dismissed by August 1, 1991. Notices mailed. (eml)
- July 23 Parties' Joint Response To Order of Court Dated July 18, 1991, received and filed. (db)
- Aug. 1 Brief of plaintiff/appellee/cross-appellant Walter F. Biggins received and filed. (bf)
- Aug. 30 Reply Brief of the defendants/appellants and brief of cross/appellees Hazen Paper Co., received and filed. (db)
- Sept. 9 Reply brief of the plaintiff/appellee/cross-appellant Walter F. Biggins received and filed. (bf)
- Sept. 11 Motion to strike portion of reply brief of the plaintiff/appellee/cross-appellant Walter F. Biggins, received and filed. (rm)

1991

FILINGS-PROCEEDINGS

- Sept. 16 Opposition to motion to strike portion of reply brief and alternative motion for leave to file reply brief, received and filed. (rm)
- Sept. 19 Assigned for hearing at the October, 1991 session. (cm)
- Sept. 20 ORDER: (Torruella, J.) In view of the parties' response to this court's show cause order, these appeals may proceed in normal course. No final jurisdictional ruling is made at this time, but rather the matter is reserved for consideration by the panel hearing the merits of the appeals. Notices mailed. (db)
- Oct. 1 Order: (Torruella, J.) Defendants' objections to plaintiff's reply brief are noted. The motion to strike is denied without prejudice to reconsideration by the panel deciding the merits of the appeal. Notices mailed. (rm)
- Oct. 11 Heard before Torruella, Bownes, Tauro, JJ. (cm)
- 1992
- Jan. 8 Judgment: the judgment of the district court is affirmed in part, reversed in part and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date. No costs to either party. Opinion of the Court by Bownes. Notices mailed. (rm)
- Jan. 21 Petition of defendants/appellants/cross-appellees for rehearing and suggestion for rehearing *en banc*, received and filed. (rm)
- Jan. 22 Plaintiff/appellee/cross-appellant's petition for rehearing and for rehearing *en banc*, received and filed. (rm)
- Jan. 29 Order: (Breyer, Ch. J., Bownes, Torruella, Selya, Cyr and Tauro, J.J.) denying the petition for rehearing and the suggestion for rehearing *en banc*. Notices mailed. (rm)

1992

FILINGS-PROCEEDINGS

- Feb. 6 Mandate issued, copy filed. Original papers returned to district court. Notices mailed. (rm)
- Feb. 10 Application of plaintiff (Appellee/cross-appellant) for award of attorneys' fees and costs, received and filed. (rm)
- Feb. 10 Memorandum of plaintiff (Appellee/cross-appellant) in support of application for attorneys' fees and costs, received and filed. (rm)
- Feb. 13 Opposition to plaintiff/appellee/cross-appellant's application for award of attorney's fees and costs, received and filed. (rm)
- Feb. 19 Plaintiff's motion to recall and amend mandate to clarify instructions respecting the allowance of interest, received and filed. (rm)
- Feb. 19 Memorandum in support of plaintiff's motion to recall mandate, received and filed. (rm)
- Feb. 24 Defendants-appellants' opposition to plaintiff's motion to recall and amend mandate, received and filed. (rm)
- Feb. 26 Order (Bownes, J.) Plaintiff is entitled to appellate attorney fees on the ADEA claim and the ERISA claim only. Plaintiff is also advised that this court will follow the district court and approve attorney's fees for partners in the amount of \$165 per hour and paralegals at the rate of \$50 per hour. The hourly fees for associates and junior associates should also be reduced accordingly. Finally, we advise plaintiff that no costs will be allowed. The plaintiff did not entirely prevail on appeal, and in this circuit, we usually do not allow costs in a case where there has been mixed results and the defendant has also prevailed on some important issues for reasons stated in said order. Notices mailed. (rm)
- Mar. 2 Plaintiff's reply to defendants' opposition to plaintiff's motion to recall and amend mandate, received and filed. (rm)

1992

FILINGS-PROCEEDINGS

- Mar. 5 Order: (Torruella, Bownes and Tauro, JJ.) The mandate in this case, which was issued on February 6, 1992, is constructively recalled. The mandate is amended by adding the following: "The district court is instructed to compute post-judgment interest from August 27, 1990, the date of the district court's initial judgment. Mandate is constructively reissued. Notices mailed. (rm)
- Mar. 10 Amended application of plaintiff (appellee/cross-appellant) for award of attorney's fees and costs, received and filed. (rm)
- Mar. 11 Defendant/appellants' response to plaintiff/appellee's amended application for attorney's fees and costs, received and filed. (rm)
- Mar. 19 Order: (Bownes, J.) We find that plaintiff's attorneys have satisfactorily complied with our order of February 26, 1992, in all respects except one. We do not think there has been an adequate reduction in the hours billed by attorneys Egan and Cahillane for writing the appellate brief. We award the plaintiff \$71,798.50 for appellate attorney's fees for reasons stated in said order. Notices mailed. (rm)
- Mar. 19 Order: (Torruella, Bownes and Tauro, JJ.) The clerk of the district court is requested to add to this court's mandate the amount of appellate attorney's fees in the amount of \$71,798.50 to the plaintiff. Notices mailed. (rm)
- April 9 Notification of filing Petition for Writ of Certiorari on April 3, 1992, October 1991 Term, Supreme Court No. 91-1600, received and filed in Case Nos. 91-1591 and 91-1614. (db)

1992

FILINGS-PROCEEDINGS

- May 18 Notification of filing petition for writ of certiorari on April 30, 1992, Supreme Court Case No. 91-1818, October 1991 Term, received and filed. (db)
- June 25 Supreme Court Order dated June 22, 1992, allowing petition for writ of certiorari in Supreme Court No. 91-1600, Court of Appeals Nos. 91-1591 and 91-1614, received and filed. (db)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Caption Omitted]

AMENDED COMPLAINT

INTRODUCTION

1. This is an action filed pursuant to the Age Discrimination in Employment Act of 1967 as amended (29 U.S.C. 621) and the Employee Retirement Income Security Act of 1974 (29 U.S.C. Sec. 1140) together with several pendant common law claims under Massachusetts state law.

PARTIES

2. The plaintiff, Walter F. Biggins is an individual and a citizen of the United States residing at 52 Redfern Drive, Longmeadow, Massachusetts.

3. The defendant, Hazen Paper Company is a corporation organized under the laws of Massachusetts with a principal place of business at Holyoke, Massachusetts.

4. The defendant, Thomas Hazen is an individual and a citizen of the United States residing at 17 College View Heights, South Hadley, Massachusetts.

5. The defendant, Robert Hazen is an individual and a citizen of the United States residing at 125 Woodbridge Terrace, South Hadley, Massachusetts.

JURISDICTION AND VENUE

6. Jurisdiction of this Court is proper under 28 U.S.C. Sec. 1337 and 29 U.S.C. Sec. 1132(c). Venue is proper within the Western District of Massachusetts as all the parties reside

within the District and all of the actions which are the subject of the suit occurred within the District.

FACTS

7. The plaintiff was born on May 29, 1925 and is presently 62 years of age.

8. On or about March 1, 1977, the plaintiff became employed by the defendant, Hazen Paper Company in the capacity of technical director.

9. At all times while the plaintiff was employed by the defendant company he performed all the duties required of him competently and well, to the benefit of the defendants.

10. During 1980 and 1981 the plaintiff, on his own initiative and using his own resources and skills, developed a new formula and process for the coating of certain foil paper manufactured by the defendant company. Plaintiff offered the use of this invention to the defendant company but the defendants decided not to make use of the process and formula until sometime in 1983. At all times the said process and formula had been known only to the plaintiff and the defendants. Use of the formula and process proved to be quite valuable and gave the defendant company a tremendous advantage over competitors. Eventually it created huge profits for the defendant company and continues to do so presently.

11. With the defendant company's successful use of the plaintiff's process and formula the plaintiff requested of company president, Thomas Hazen, additional compensation as consideration for the successful use of his process and formula. In response the defendant, Thomas Hazen, promised the plaintiff that he would receive corporate stock of a sufficient value to raise his salary (then \$43,000.00 per year) to a minimum of \$100,000.00. The plaintiff agreed to this offer and in reliance on the defendant's promise continued to allow the defendant company to make use of his formula and process, maintained its secrecy and continued his employment with the defendant corporation.

12. Although the defendants continued to promise the plaintiff that they would implement the above said agreement there was continuing delay and avoidance of the plaintiff's inquiries.

13. On May 30, 1986, the defendants presented the plaintiff with an "Employee Confidentiality Patent and Trade Secret Agreement" with a demand that he sign said agreement by June 9, 1986. At the same time they complained to the plaintiff that certain off duty business activities which he had been engaged in for some time were "unacceptable". The proposed agreement did not incorporate any of the previously agreed upon benefits for the plaintiff but required inter alia that the plaintiff assign to the defendants any right to trade secrets which he had or would develop and that he promise not to make future use of them for his benefit. It also required his signing a non-competition agreement.

14. Plaintiff sought counsel with respect to the defendants proposed agreement but defendants insisted he sign it without further discussion. On June 13, 1986 when the plaintiff refused to sign the agreement at the insistence of Thomas Hazen, he was fired and ordered to leave the building.

15. At the time of his dismissal, the plaintiff was 61 years old. Defendants at that time had a retirement plan which the plaintiff had participated in for over nine years. He required only 56 additional work hours to become fully vested in said plan.

16. Shortly after his termination, the defendants filled the plaintiff's position with a considerably younger individual.

17. Immediately after the plaintiff's termination, the defendants (by letter to plaintiff's counsel at that time) took the position that the defendants had a proprietary interest in information processes, etc. which the plaintiff had developed while employed at Hazen Paper Company.

COUNT I

(AGE DISCRIMINATION)

18. The conduct of the defendants in terminating the plaintiff's employment, replacing him with a younger individual,

and acting to deprive him of his pension benefits constitutes illegal age discrimination in violation of 29 USC, Section 623.

19. The above said actions of the defendants were willful violations of 29 USC, Section 623.

20. On March 24, 1987 the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission in accordance with 29 USC, Section 626.

21. As a direct and proximate result of the actions of the defendants in terminating the plaintiff's employment, the plaintiff has and will continue to lose the benefits of his employment with the defendants included but not limited to back wages, future wages, bonuses, insurance benefits, and pension benefits.

WHEREFORE, the plaintiff prays:

1. That he be awarded compensatory damages in the amount of \$1,000,000.
2. That he be awarded an equal amount of liquidated damages.
3. That he be awarded reasonable attorney's fees, plus costs.
4. That the Court grant such other and further relief as it deems just.

COUNT II

(ERISA)

22. The plaintiff hereby repeats and realleges each and every claim made in paragraphs 1 through 21.

23. During the period of the plaintiff's employment, the defendants maintained the above-described retirement plan for the benefit of its employees, including the plaintiff. Said plan was, and continues to be, an "employee benefit plan" as that term is defined in 29 USC, Section 1002.

24. Had the plaintiff been allowed to continue his employment, he would have been fully vested in said plan after 56 more work hours.

25. Had plaintiff been allowed to continue his employment until his expected retirement date, he would have been entitled to take a normal retirement under said plan and would have been entitled to substantial benefits under said plan.

26. The actions of the defendants in terminating the plaintiff were in whole or part for the purpose of interfering with the plaintiff's attainment of the rights to which he would have become entitled to under the aforementioned retirement plan had he become fully vested in said plan.

27. The conduct of the defendant was in violation of an[d] contrary to the provisions of 29 USC, Section 1140.

28. As a direct and proximate result of the conduct of the defendants, the plaintiff has been deprived of his employment and all the rights and benefits to be derived therefrom and has been prevented from obtaining a fully vested right and a normal retirement benefit under said plan.

29. Recourse by the plaintiff to defendant's employee benefit claims procedure would be futile since plaintiff was discharged for the purpose in whole or part of preventing him from becoming fully vested in said plan and/or from obtaining a normal retirement benefit from said plan.

30. Copies of this complaint have been mailed to Anne McLaughlin, Secretary of Labor and James Baker, Secretary of the Treasury.

WHEREFORE, the plaintiff prays:

1. That the Court award plaintiff damages for earnings and benefits lost by him from 1977 to the date of judgment.
2. That the Court order the defendants to reinstate the plaintiff to his rightful position and retroactively restore to the plaintiff all of the benefits of his employment including the aforementioned employee benefit plan.
3. That the Court award the plaintiff costs and reasonable attorney fees.
4. That the Court award such further relief as it deems just.

COUNT III

(DECLARATORY JUDGMENT)

31. The plaintiff hereby repeats and realleges each and every claim stated in paragraphs 1-30.

32. The plaintiff is the rightful inventor, developer and owner of the trade secret formula and process described in paragraph 10. The defendant's use of this process and formula derives from its fraudulent inducement of the plaintiff to allow such use based on promises of additional stock compensation which the defendants never intended to comply with.

33. The defendants through their agents have asserted proprietary rights to the plaintiff's process and formula. Plaintiff is the rightful and sole owner of said trade secrets and wishes to make use of them for his own benefit. An actual controversy has therefore arisen between the parties as to the ownership of said trade secrets and the rights to them.

WHEREFORE, the plaintiff prays:

1. That the Court enter a judgment determining the rights of the parties to the trade secret formula and processes and declaring that the plaintiff is the rightful owner.

2. The Court enter an order deterring the rights of the parties to the stock promised the plaintiff and ordering the defendant to turnover said stock to the plaintiff.

3. That the Court enter a permanent injunction and restraining them from interfering with the plaintiff's use thereof.

COUNT IV

(WRONGFUL DISCHARGE)

34. The plaintiff hereby repeats and realleges each and every claim stated in paragraphs 1-33.

35. The actions of the defendants in discharging the plaintiff due to his age and/or to deprive him of his earned pension rights and/or for his refusal to relinquish his right to inventions and

trade secrets developed by himself and his right to use and market those inventions and/or for discharging the plaintiff in order to prevent his obtaining corporation stock earned by him under the promises made by the defendants were wrongful and in bad faith and a violation of the implied covenant of good faith and fair dealing between the parties and were against public policy.

36. By reason of his wrongful discharge made in bad faith by the defendant, the plaintiff has suffered loss of salary plus all other benefits of employment including loss of pension rights and ownership of corporate stock.

WHEREFORE, the plaintiff prays:

1. That the Court award him compensatory damages in the amount of \$5,000,000.

2. That the Court award him reasonable attorneys fees and costs.

3. That the Court grant such further relief as it deems just.

COUNT V

(ESTOPPEL/FRAUD)

37. The plaintiff hereby repeats and realleges each and every claim stated in paragraphs 1-36.

38. The defendants fraudulently promised the plaintiff that in exchange for his trade secret development they would pay him in addition to his regular salary corporate stock of a value which would increase his annual compensation to \$100,000.00. The plaintiff in reliance upon this promise continued to allow the defendants to utilize exclusively the trade secrets he had developed, forewent personal marketing and use of the trade secret and continued his employment with the defendants with the understanding that he would receive the stock. Such reliance caused the plaintiff detriment and was fraudulently induced by the defendants.

WHEREFORE, the plaintiff prays:

1. That he be awarded compensatory damages in the amount of \$5,000,000.
2. That he be awarded his attorneys fees and costs.
3. That the Court grant such other and further relief as it deems just.

COUNT VI

(CONVERSION)

39. The plaintiff hereby repeats and realleges each and every claim stated in paragraphs 1-38.

40. The actions of the defendants in fraudulently inducing plaintiff to allow exclusive use of his property and in appropriating the plaintiff's trade secret developments without compensating him as promised constitute wrongful conversion of the plaintiff's property.

WHEREFORE, the plaintiff prays:

1. That he be awarded compensatory damages in the amount of \$5,000,000.
2. That the Court award the plaintiff his attorneys fees and costs.
3. That the Court grant such other and further relief as it deems just.

COUNT VII

(MASS. CIVIL RIGHTS c. 12)

41. The plaintiff hereby repeats and realleges each and every claim stated in paragraphs 1-40.

42. The actions of the defendants in discharging the plaintiff on account of his age, pension rights, in wrongfully discharging him in violation of the covenant of good faith and fair dealing and in violation of public policy, in wrongfully converting the plaintiff's property and in fraudulently inducing the plaintiff

to allow continued use of his property constitute a violation of M.G.L. c. 12, Section 11H and Section 11I.

WHEREFORE, the plaintiff prays:

1. That he be awarded compensatory damages in the amount of \$5,000,000.
2. That he be awarded his attorneys fees and costs.
3. That the Court grant such other and further relief as it deems just.

COUNT VIII

(BREACH OF CONTRACT)

1. During the plaintiff's employment with the defendants, the company maintained certain personnel policies which were part of the terms and conditions of the plaintiff's employment and were either implied or express terms of an employment contract between the plaintiff and the defendants.

2. Said policies prohibited discrimination on the basis of age regarding terms of employment including termination and further prohibited termination unless there were outlandish gross violations of standards or failure to respond to repeated counselling.

3. By their actions as described above, the defendants violated these provisions of the contract.

WHEREFORE, the plaintiff prays:

1. That he be awarded compensatory damages in the amount of Five Million (\$5,000,000.00) Dollars.
2. That the Court award him reasonable attorney's fees and costs.
3. That the Court grant such further relief as it deems just.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Dated: July 26, 1988 s/ MAURICE CAHILLANE
 MAURICE M. CAHILLANE, ESQ.
 JOHN J. EGAN, ESQ.
 EGAN, FLANAGAN AND EGAN, P.C.
 69 Market Street
 Post Office Box 9035
 Springfield, MA 01102
 (413) 737-0260

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

[Caption Omitted]

AMENDED ANSWER OF DEFENDANTS
 HAZEN PAPER COMPANY, ROBERT HAZEN,
 AND THOMAS HAZEN

Defendants, by their attorneys, hereby respond to the separately numbered paragraphs of the Amended Complaint in this action as follows:

FIRST DEFENSE

Answers to each paragraph of the Amended Complaint by Defendants are made without waiving, but expressly reserving, all rights that they might have to seek relief by appropriate motions directed to the allegations in the Amended Complaint.

"INTRODUCTION"

1. Defendants need not respond to the legal averments set forth in paragraph 1 of the Amended Complaint.

"PARTIES"

2. Defendants admit the factual allegations set forth in paragraph 2 of the Amended Complaint.
3. Defendants admit the factual allegations set forth in Paragraph 3 of the Amended Complaint.
4. Defendants admit the factual allegations set forth in Paragraph 4 of the Amended Complaint.
5. Defendants admit the factual allegations set forth in Paragraph 5 of the Amended Complaint.

"JURISDICTION AND VENUE"

6. Defendants need not respond to all of the allegations in Paragraph 6 of the Amended Complaint in so far as that paragraph sets forth legal averments. To the extent that Paragraph 6 may be deemed to make factual allegations, Defendants deny them, except admit that all parties reside within the Western District of Massachusetts.

"FACTS"

7. Defendants admit the factual allegations set forth in paragraph 7 of the Amended Complaint.
8. Defendants admit the factual allegations set forth in Paragraph 8 of the Amended Complaint, except that Plaintiff started work for Defendants on March 8, 1977.
9. Defendants deny the allegations set forth in Paragraph 9 of the Amended Complaint.
10. Defendants deny the allegations set forth in Paragraph 10 of the Amended Complaint.
11. Defendants deny the allegations set forth in Paragraph 11 of the Amended Complaint.
12. Defendants deny the allegations set forth in Paragraph 12 of the Amended Complaint.
13. Defendants deny the allegations set forth in Paragraph 13 of the Amended Complaint. Further answering, Defendants state that the proposed "Employee Confidentiality Patent and Trade Secret Agreement" and the proposed "non-competition agreement" speak for themselves.
14. Defendants deny the allegations set forth in Paragraph 14 of the Amended Complaint.

15. Defendants admit the factual allegations set forth in Paragraph 15 of the Amended Complaint, except deny that Plaintiff required 56 additional work hours to become vested in the retirement plan.
16. Defendants admit that, after Plaintiff's termination, a younger individual applied for his position and was hired.
17. Defendants deny the allegations set forth in Paragraph 17 of the Amended Complaint. Further answering, Defendants state that it was always their position that all discoveries, inventions and improvements, applicable in any way to Defendant's business, were Defendant's sole and exclusive property.

"COUNT I"

18. Defendants deny the allegations set forth in Paragraph 18 of the Amended Complaint.
19. Defendants deny the allegations set forth in Paragraph 19 of the Amended Complaint.
20. Defendants need not respond to the legal averments set forth in Paragraph 20 of the Amended Complaint. Further answering, Defendants state that they received notice of charges of discrimination purportedly filed by Plaintiff with the Massachusetts Commission Against Discrimination and with the Equal Employment Opportunity Commission.
21. Defendants deny the allegations set forth in Paragraph 21 of the Amended Complaint.

"COUNT II"

22. Defendants repeat their answers as set forth above in Paragraphs 1-21 and incorporate them herein by reference.
23. Defendants need not respond to the legal averments set forth in Paragraph 23 of the Amended Complaint.

Further answering, Defendants admit that a retirement plan is maintained for the benefit of its employees. Said retirement plan document speaks for himself.

24. Defendants deny the allegations set forth in Paragraph 24 of the Amended Complaint.
25. Defendants deny the allegations set forth in Paragraph 25 of the Amended Complaint.
26. Defendants deny the allegations set forth in Paragraph 26 of the Amended Complaint.
27. Defendants deny the allegations set forth in Paragraph 27 of the Amended Complaint.
28. Defendants deny the allegations set forth in Paragraph 28 of the Amended Complaint.
29. Defendants deny the allegations set forth in Paragraph 29 of the Amended Complaint.
30. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 30.

"COUNT III"

31. Defendants repeat their answers as set forth above in Paragraphs 1-30 and incorporate them herein by reference.
32. Defendants deny the allegations set forth in Paragraph 32 of the Amended Complaint.
33. Defendants deny the allegations set forth in Paragraph 33 of the Amended Complaint.

"COUNT IV"

34. Defendants repeat their answers as set forth in Paragraphs 1-33 and incorporate them herein by reference.
35. Defendants deny the allegations set forth in Paragraph 35 of the Amended Complaint.

36. Defendants deny the allegations set forth in Paragraph 36 of the Amended Complaint.

"COUNT V"

37. Defendants repeat their answers as set forth in Paragraphs 1-36 and incorporate them herein by reference.
38. Defendants deny the allegations set forth in Paragraph 38 of the Amended Complaint.

"COUNT VI"

39. Defendants repeat their answers as set forth in Paragraphs 1-38 and incorporate them herein by reference.
40. Defendants deny the allegations set forth in Paragraph 40 of the Amended Complaint.

"COUNT VII"

41. Defendants repeat their answers as set forth in Paragraphs 1-40 and incorporate them herein by reference.
42. Defendants deny the allegations set forth in Paragraph 42 of the Amended Complaint.

"COUNT VIII"

43. Defendants deny the allegations set forth in Paragraph 1 of the Amended Complaint.
44. Defendants deny the allegations set forth in Paragraph 2 of the Amended Complaint.

SECOND DEFENSE

Counts II - VII fail to state claims against Defendants for which relief may be granted. Defendants reserve the right pur-

suant to Fed. R. Civ. P. 12(b)(6), 12(c), 12(d), and 12(h)(2) to make application to the Court prior to trial to move to dismiss all or any part of this action.

THIRD DEFENSE

Plaintiff's claims are barred by the equitable doctrines of estoppel, waiver, and unclean hands.

FOURTH DEFENSE

Count II of the Amended Complaint is barred because Plaintiff has failed to exhaust plan remedies as required by the Employee Retirement Income Security Act ("ERISA").

FIFTH DEFENSE

Count II of the Amended Complaint is barred by Plaintiff's failure to follow and exhaust administrative procedures as required by ERISA.

SIXTH DEFENSE

The alleged covenant, promises and inducements sued upon in Counts IV, V and VI are void for lack of consideration.

SEVENTH DEFENSE

The alleged covenant, promises and inducements sued upon in Counts IV, V and VI cannot support this action because Plaintiff breached the conditions that he not engage in unethical conduct or dishonesty.

EIGHTH DEFENSE

Count IV is preempted by ERISA.

NINTH DEFENSE

Count IV is precluded by the availability of comprehensive remedies under the Age Discrimination in Employment Act and Mass. Gen. Laws ch. 151B.

TENTH DEFENSE

The alleged promises and inducements, sued upon in Count V and Count VI, by their terms were not to be performed within one year from the making thereof and neither said promises or inducements nor any note or memorandum thereof was ever made in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized, as required by the laws of Massachusetts.

ELEVENTH DEFENSE

Termination of Plaintiff's employment was fully justified by Plaintiff's unethical conduct and dishonesty.

TWELFTH DEFENSE

Defendants fully performed all of their obligations to Plaintiff.

THIRTEENTH DEFENSE

The alleged contract sued upon in Count VIII is void for lack of consideration.

FOURTEENTH DEFENSE

The alleged contract sued upon in Count VIII, if it exists, cannot support this action because Plaintiff breached the condition that he not jeopardize customer relations, and that he respond to repeated counselling.

Respectfully submitted,

HAZEN PAPER COMPANY,
THOMAS HAZEN AND ROBERT HAZEN

s/ PATRICK W. MCGINLEY

SULLIVAN & HAYES
PATRICK W. MCGINLEY •
1500 Main Street, Suite 1712
Post Office Box 15668
Springfield, Massachusetts 01115
Telephone: (413) 736-4538

Dated in Springfield, Massachusetts
on this third day of August, 1988

[Certificate of Service Omitted]

EXCERPTED TRIAL TRANSCRIPTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Caption Omitted]

• • •

[July 16, 1990, Volume I, p 34] A. Discharged November 5th, 1945.

Q. And were you honorably discharged? A. Yes, I was.

Q. Did you receive any decorations? A. I received a Combat Infantry Badge, and an Italian Campaign Medal, with four clusters. Good Conduct Medal.

Q. Anything else? A. Also received a Bronze Star.

Q. What was that for, Mr. Biggins? A. It was for valor, I guess they call it.

Q. Anyone refer to you as a Benedict Arnold then? A. No, they didn't.

Q. Now, after you were discharged from the Army, Mr. Biggins, did you take advantage of the GI Bill to pursue your education? A. Yes, I did.

Q. And what did you do? A. I entered Holy Cross College the day after I was discharged.

Q. And what did you do at Holy Cross? A. I took courses related to the Bachelor Degree in — Bachelor of Science in chemistry.

[35] Q. When you had completed your Bachelor's Degree, what did you do? A. I was awarded a Fellowship to get my Master's Degree by Holy Cross.

Q. And what was the criteria for that Fellowship? A. Marks, attitude.

Q. And did you receive such a Fellowship? A. Yes, I did.

Q. Did you receive a graduate degree? A. I received a graduate degree in 1950.

Q. That was in? A. Chemistry.

Q. And at the time, Mr. Biggins, what did you do? A. I sought employment.

Q. And where was the first place that you were employed? A. My first employment was with Brown Company in Berlin, New Hampshire.

Q. What was your job there? A. I was a research chemist in their Research Department.

Q. What does Brown Company do, or did it do at the time? [36] A. Brown Company is one of the oldest paper companies in America.

And they made specialty paper, regular paper. They were the first ones to invent paper towels. They sold a lot of wood pulp for photographic film.

Q. What did your job duties involve there? A. I was hired to work on cellulose and nitrate derivatives in a contract for the Government for smokeless gunpowder.

Q. And how long were you at Brown? A. I was at Brown Company about five years.

Q. And then what did you do? A. I left Brown Company and went with Universal Match Corporation outside Boston.

Q. And Universal Match Corporation, what did they do?

A. Universal Match Company operated a base for a Government agency, and in the town of Maynard.

Q. Is that where you worked? A. Yes, I did.

Q. What were your job responsibilities there? A. I was a research chemist. I worked on explosives. And when the base was closed, I was [37] cautioned I could never discuss the work that we performed.

Q. Now, after that, what did you do? A. I went to work with Ludlow Corporation in Needham, Massachusetts.

Q. What was your job there? A. I was a research and development chemist with them.

Q. Excuse me. What time are we in right now? A. I went and joined Ludlow in 1957.

Q. Now, what was the business that Ludlow Corporation was in? A. Ludlow is in several businesses, but I was hired to work in their fine paper division as a research chemist.

Q. Did you do anything else in Ludlow? A. Well, I fulfilled several functions. The company was growing. It had been merged. It had been formed by a merger of several smaller companies, and they had plants located across the country.

And I set up the quality control program, a unified program between all plants. I did product application work after that program was [38] set up, when we had to determine what the customer needed and talk with the customer, and come back and write project proposals.

And I ended up in technical service, acting as liaison between the laboratory, the manufacturer, and customers.

And finally, I served probably three years as a field sales representative in New England.

Q. And how long were you with Ludlow? A. I joined them in '57. I left in 1966.

Q. Where did you go to work then? A. I went to work for Dexter Corporation in Windsor Locks, Connecticut.

Q. And what was your job title at Dexter? A. At Dexter, the official title was Project Manager.

Q. And what business was Dexter in? A. Dexter was a paper manufacturer that specialized in long fibered papers. They invented bag paper.

Q. Now, Mr. Biggins, in 1977, did you become employed by the Hazen Paper Company in Holyoke? A. I did.

[39] Q. And what was the job that you were hired for? A. Hired as a Technical Director.

Q. And at that time, did Hazen Paper Company have a Technical Director? A. No, they did not. They never had the function before that.

Q. And what did that job involve? A. It involved the aspects of technical requirements for manufacturing paper. And setting them up, implementing and maintaining contact with the Executive Committee to be sure that they are all tied in together.

Q. I'm going to show you — if I may approach the witness — a copy of a document, Mr. Biggins, and ask you if you could identify that. A. Yes.

Q. What is that document? A. That is the job description that I received, oh, some days after I joined the company in 1977.

Q. This was the description of your job duties at the Hazen Paper Company? A. Yes, it was.

MR. CAHILLANE: I would like to [40] offer this as Exhibit 3.

MR. MCGINLEY: No objection.

(Plaintiff's Exhibit 3 marked in evidence.)

Q. (By Mr. Cahillane) Now, at the time when you were hired, Mr. Biggins, who owned the Hazen Paper Company?

A. It was a privately held company. Owned by two cousins, Robert and Thomas Hazen.

Q. And what was the business that the Hazen Paper Company was in? A. Hazen Paper was a converter. They bought paper and did something to it. They were primarily gravure printers, and they applied coatings and designs to paper using the gravure process.

Q. And could you tell the jury, Mr. Biggins, what types of products the Hazen Paper Company produced? A. They made a lot of printed paper that was used in cosmetic wrap.

When you walk through Steiger's or G. Fox at Christmastime, you find the cosmetic, various cosmetic people have very fancy designed boxes for the cosmetics. And Hazen was the supplier . . .

. . . .

[49] . . . nip. They nip the two things, so you will hear that as we talk.

The foil, or paper, is fed into the nip, comes in contact with the filled cells. It's a lot of pressure in here, and the ink is transferred to the surface by capillary action.

Capillary action is what the bath towel does in the morning. It takes the water and gets it between the surface and makes it spread.

And the pressure here in the nip causes the ink to spread and coat the surface of the foil. This rubber backup roller causes the pressure, and you notice that the majority of the ink is transferred to the web.

These cells do contain a little bit of residual in the corners, and they redisperse down here.

I want you to now notice that this level in this is an ink, there is a solvent type system. It's level, relatively level, and this is the very narrow plumb that comes up to this doctor blade. And the doctor blade is set up the same. That is the gravure station.

Q. Now, this station appears on a printing machine? [50]

A. On a printing machine or a laminator or both.

Q. Do you have with you a picture of such a machine?

A. Yes, I do.

Q. Could I ask you first, this picture that you have in your hand right now, how did you obtain this? A. This is copied from a magazine.

Q. What type of magazine? A. Trade magazine, discussing pressures and that sort of thing.

Q. A picture of what? A. Of a five-station printer. Similar to the ones that are used in the business.

It might be used for printing the gravure section of the newspaper.

Q. Were such machines used at Hazen Paper Company?

A. Yes, this is the same idea of the machines that they did use.

MR. CAHILLANE: Your Honor, I would like to offer this picture and ask permission to show it to the jury.

MR. MCGINLEY: No objection.

[51] (Plaintiff's Exhibit 5 marked in evidence.)

Q. (By Mr. Cahillane) Now, Mr. Biggins, you also made reference to lamination on foil as a product that Hazen Paper Company produces. A. Yes. It is a bigger product than — in volume than the printed paper.

Q. And do you have a diagram to explain that process as well? A. Yes, I do.

MR. CAHILLANE: Once again, your Honor, I would like to offer this. We have copies of the diagram.

(Plaintiff's Exhibit 6 *marked in evidence.*)

Q. (By Mr. Cahillane) Have you got it set up now? A. Yes.

Q. This is a copy of what? A. This is a typical paper and foil or film laminator. It approximates the one — it's one similar to the present one at Hazen's.

Q. Using this diagram, explain the process from the beginning to the end that Hazen or such a company would go through. [52] A. Yes. Once you have — this machine is approximately 150 feet long. The height to here is probably 25 to 30 feet. These stations are probably chest high. The paper is put on the shaft this way, roll unwound, fed into the machine.

Let's talk about foil. The foil is mounted on this on a stand in this direction. It's the same foil you get at a home to wrap sandwiches, but it is a bigger form.

The foil is unwound and passed through an adhesive station. It is not a gravure station. This is a smooth rubber roll. It transfers the adhesive to the foil.

Then the foil transfer is fed into a nip. Once again, a nip, and the adhesive on the bottom and the paper is fed so that it comes in contact with the foil at that particular point, and the two are squeezed together or nipped.

The paper then travels for a distance to allow the adhesive to flow, and removes some of the stress. And it is passed up through the gravure station, the same gravure station as used on a printing press. And lacquer is applied to the surface of the foil.

Now, it's absolutely necessary to apply [53] lacquer because the foil is very, very active metal. And standing in contact with the air, it oxidizes. And if it oxidizes, it can't be printed subsequently. So a protective coating has to be applied to the coating whenever foil is laminated on one of these machines.

The paper then passes through the oven, 300 degrees sometimes, and is rewound and goes through another nip here,

but this is just to pull the paper through the machine. And it is rewound here as the laminated product.

It's a typical lamination. Sometimes these stations can be underneath the drive.

Q. Mr. Biggins, the machines that show the process of that diagram, you also have a picture of that? A. Yes, I do.

Q. Just in case I cut you off, is there anything else about that process that you wanted to explain to the jury? A. I don't think so right now.

Q. Okay. Now, this picture you have is a picture of what?

A. This is a picture of, once again, taken [54] from a magazine. The unwind station is under the machine. The foil station is under the machine.

The two unwind's adhesive is applied to the foil, the majority is made up in this area, the paper comes down and the lacquer is applied in this station, and the paper goes through the oven and is rewound down here. Same setup.

MR. CAHILLANE: If I might, I would also like to offer this picture and show it to the jury, if I may.

THE COURT: All right.

MR. CAHILLANE: I think we are through with the overhead for the time being.

Q. (By Mr. Cahillane) Now, Mr. Biggins, in your job as Technical Director, did part of your job at Hazen Paper Company involve product development? A. Yes.

Q. In what way? A. Well, rather specifically stated that product development would deal with getting materials from vendors, and vendors at Hazen Paper Company were people who supplied ink, supplied paper, supplied foil.

Q. Vendors, you're talking about people [55] outside the company? A. Yes.

Q. Who sold to the company? A. Yes.

Q. And what was your understanding of what your role was to be in this type of product development as Technical Director? A. To work with the vendors; to obtain different materials; to develop new products.

Q. Were you ever asked to invent or develop any of these products yourself? A. No, I was not.

Q. Now, at some point in time, did you become involve[d] yourself in developing coatings or inks at Hazen Paper Company? A. Yes, I did.

Q. And when you talk of coatings, this includes the materials that you had on those diagrams at the bottom of the roll is what goes on the paper? A. Yes.

Q. Now, at some point in time, did you become involved in developing a particular kind of coating? A. Yes, I did.

[56] Q. And was that a coating — well, let me ask you this.

When you came to the Hazen Paper Company, the coatings that were in use at the time were made of what?

A. Nitrocellulose predominantly, and some vinyl, but that was exclusively the two systems that we used.

Q. And within the industry, were these the type of coatings that were generally used? A. That was pretty much related to the whole industry, yes.

Q. At some point, did you become involved in developing a water-based coating? A. Yes, I did.

Q. And what would be the difference between that type of coating and the nitrocellulose and vinyl you just mentioned?

A. Because it's water, it doesn't dissolve, and because it's water, it behaves differently on the machine.

Q. Did the use or the existence of a water-based coating have any other significance to the industry at the time you came to Hazen Paper Company, or shortly thereafter? [57] A. Yes. Because the Clean Air Act, the industry was being required by the Federal Government to cease pumping the evaporated solvent into the atmosphere, causing environmental problems.

Q. And what did the evaporated solvents going into the air, where were they coming from? A. Coming from several sources, but were coming from the ovens in the top of those laminators, coming from the ovens, and the top of the various gravure sections in the printing presses.

Q. Now, when was this that we are talking about? A. Late '70's it started to happen.

Q. At that point in time, was this a problem that Hazen Paper Company had to deal with? A. It was, yes. It was evidently going to have great impact on the company.

Q. And what were the alternatives that Hazen had in terms of making environmental compliance with those, the laws and regulations? A. Two choices. They could either eliminate the use of solvents, or they could destroy the solvents before they evaporated them to the atmosphere.

[58] Q. And what would the latter involve? A. The latter involves very expensive incineration. You have a gas flame, very high temperature. And you pass those vapors over the gas flame and burn them, but they are very dilute, actually, so it takes a lot of gas to do it.

Q. And in the late 1970's, did you begin to deal with this problem for Hazen Paper Company? A. Yes, I recognized that it was going to be important.

Q. And what did you do? A. I started contacting vendors to see if they would have some water-based systems that could be offered to start eliminating or reducing the amount of emissions.

Q. Did vendors offer water-based coatings to you? A. Yes. All of them are working on — it was a brand-new area. We had been caught unaware. The coating suppliers were starting really from scratch, and they had initial candidates for evaluation, and I evaluated several.

Q. What became of that evaluation? A. We determined that a couple of [59] candidates held the most promise.

Q. And was something done about that; were they evaluated? A. We contacted these people and asked for samples. They supplied us samples free of charge, and they usually came in five-gallon pails, and we made evaluations of those samples on the equipment.

Q. And were the products that were offered successful?

A. One held a little bit of promise initially, but it deteriorated and it was not going to be suitable.

Q. Now, at that point in time, what did you do? A. I decided that because they were in the infancy of a growing field, because I had a considerable background developing coatings from my past experience, that I myself would simultaneously start investigating.

I could get the same raw materials from chemical suppliers and the various additives and do my own development, and I proceeded to do this.

Q. Were you asked by — let me ask you this. Who were your superiors at Hazen Paper [60] Company? A. I reported to Thomas Hazen exclusively.

Q. Did you also deal with Robert Hazen on many occasions?

A. Oh, yeah. I talked to him but I took — my line responsibility was to Tom Hazen to avoid confusion.

Q. Now, had Thomas Hazen asked you to go about this process of making a coating yourself? A. No, he hadn't.

Q. Was he aware that you were doing it? A. Initially, no.

Q. At some point in time, he became aware? A. Yes.

Q. Now, did you then commence to try and develop your own water-based coating? A. Yes, I did.

Q. How did you go about that? A. Whenever you do it, start a project, you have to start out with a literature search. Find out what's available, how things behave. And I undertook a literature search with the people who would have been candidates for use in this line of a development.

Q. And then what did you do? [61] A. Once I picked the samples in a general type of product that I needed, I sent away and got small laboratory samples. They came in jars. And made some work, did some work on my own.

Q. And did you — were you able to develop a coating that you thought was workable? A. Yes, I did.

Q. Now, I believe we have another diagram that might be useful to the jury to explain the use of coatings and their properties. A. Yes.

MR. CAHILLANE: I would like the Court's permission if Mr. Biggins could step up to the overhead once again.

THE COURT: All right.

Q. (By Mr. Cahillane) Now, if you could, Mr. Biggins, explain what this diagram is. A. This is a diagram of a piece of paper that's been laminated and coated.

And if we had that piece of paper laying this way, cut it sharply in half, then put a magnifying device on it, this is what we would be looking at.

This is a blown-up scheme of it.

Q. Okay. [62] And in terms of the coating itself, do you have a description there of the type of properties that you were looking for? A. Yes, I did.

Q. Explain that. A. I would love to explain it, I love talking about this product, because of all the products I have developed in my whole career, this is the best.

MR. MCGINLEY: May I have that stricken, that gratuitous remark?

THE COURT: All right. Jury will disregard the comment.

THE WITNESS: I'm sorry, your Honor.

This is a substrate. In this case, call it paper. It serves to carry the film or foil — and let's limit ourselves at the present time to foil.

So this is the foil that has been adhered to the paper in a laminator.

Now, the gravure station or the laminator, a lacquer is put on top of the foil, like I mentioned, to protect the surface.

With solvent-based coatings, it wets the [63] surface very nicely and quickly. Solvents flash off and you have a residual amount of resin, with color, additives in it to achieve the various properties.

With the water-based coating, you have a different set of circumstances because the water-base[d] coating does not evaporate quickly. Water takes a longer period of time to come off. So you have to handle it in a completely different fashion.

I will show you it in a diagram in a minute one aspect of that.

When you develop a coating with the water-base system, it becomes very complex because you first have to be careful of the bond between this coating and the film or the foil. This surface, this is a smoother surface. Nothing for the coating to bite into. So you have to rely on electrical charges, actually, and the coating to bond to the aluminum.

Now, aluminum is not magnetic, so it's not magnetic for your different kind of force that goes — I won't bore you, but you do have to use the proper electrical charges in the coating to effect this adhesion. All right.

[64] Once you get that adhesion, you probably add an additive to it. You have to then be concerned with the thickness of the film. It has to have certain properties.

One of the first things that we are able to lock onto is an additive that would take this coating, if there was a dye in it to bring the color out, to eliminate bubbles and to wet all solid particles. Bubbles would shine up or show. You will have shiny spheres, and solid, the particles would like — make the coating look cloudy.

So we had to get an additive that did this, and we found one very successfully. This film has to have properties of elasticity, and flexibility. If the product is folded or bent around something, this film has to stretch. Has to be elastic and it won't break.

And when the foil is straightened out, it has to go back together, so you have to have the property of yielding, the right amount, but never rupturing.

Further than that, you have a big problem at this surface. This is what you are selling. This is the product that when a customer [65] buys it, he's interested in this. Because his ultimate customer is a printer who makes the label seen by the customer. The ultimate customer. The consumer. So his job has to be very amenable to this surface.

You also have to put characteristics into that surface to protect it from scuffing, so you do that by adding a lubricant so that when something hits the surface, it slides. But you can't have

it with so much lubricant that the ink won't adhere to it, so you have to develop additives in this film that would glue to the surface on drying and give you a marriage of those two properties.

And this represents the ink that the ultimate customer would apply to this particular product.

Q. (By Mr. Cahillane) These were all, I take it, qualities that you had to be concerned with in developing this product?

A. Absolutely. And uncover one, you had to be careful you didn't destroy something you previously obtained.

Q. The initial reason for developing the coating was the environmental problem? [66] A. Yes.

Q. Did the coating you develop, aside from solving that problem, have any other advantages? A. Yes. It had no hazardous waste. The material that this product used would not be classified as hazardous waste.

Q. Did you meet these criteria? A. It exceeded it. It took a broader range of inks from a broader range of printing processes, and gave outstanding adhesion.

It also gives a gloss and better hold-up. That was an outstanding surface that the printer had to apply his coating to.

Q. So that was most significant to the ultimate customer? A. Yes.

Q. Now, I believe you mentioned you had another diagram to show the jury. A. Yeah. This is kind of — you remember the diagram we had with the solvent base, this is the same setup with water base.

Now, the solvent, if you dissolve it, it's like putting sugar in your coffee. It dissolves right away. The coffee stays pretty much the same.

[67] When you are working with water-based systems, these resins don't dissolve in water. But they do chemically modify them so that they swell and kind of adhere to water. They become gooey, like taffy.

And these solutions therefore are a thicker — one of the problems with the solution like that is that these cells have to be thinner, because you can't get — you can't smooth it off

even enough, and handle it with the right coating. So you have to put more cells of finer dimensions which, incidentally, results in an economy, because when you reduce the size of the cylinder, you put on less coating.

This size cylinder is used for water. You could not use it for solvent because solvent systems applied from a fine cylinder do not become continuous and become iridescent. It is not a desired property. It's kind of a rainbow effect on the surface.

So with the water base you can, because of the tendency of these molecules to coagulate and string together.

Also, I told you the solution was level in the ink with the solvent, and in this case, [68] because of that characteristic, this taffy-like appearance, the cylinder revolves, pulls down the surface and these cells coming down here tend to trap air.

So you have to put something in the coating to dispel that air. That's another great major thing we did in our product, that I did on the product, was to dispel the air in these coatings.

Prior to introducing this particular additive, this roll, when it came down here, the water base would dry. But it wouldn't redissolve. So on running, this coating would build up and in effect make them smaller and periodically, the man had to be stopped, and the surface cleaned with acid to remove this residual coating.

With this additive to effect the thing, the guys on the machine noticed that all of a sudden it would clean up, so we were able to put an additive in this to eliminate the bubbles and to stop the build-up on the roll.

Finally, this is the angle we had for the solvent base. You remember the ink fell back down, this being of a taffy characteristic, the doctor blade has to be put in very sharply so that [69] in effect clouds off the excess ink.

Q. Where is the doctor blade? A. This is the doctor blade.

Q. That's what you're referring to? A. Yes. With the solvent base, the bottom lining represents the angle. In this particular situation, it's flat. So when you are developing a coating, not only stating the previous things I talked about, you have to address these, too.

What you do here cannot affect the properties of the final product.

Q. Now, for the time being, you have explained that diagram. Perhaps we could turn that off right now.

Now, I believe when we left off, Mr. Biggins, at some point in time you felt you had developed a water-based coating, which meant that these characteristics that you just described.

A. Yes, I did.

Q. Where had you done that work? A. I had done it primarily at home, in my wife's kitchen, with a little bit of objection.

Q. Why did you do it there? A. The equipment at Hazen was not suitable to give me the temperature control that I needed.

[70] When you work with these systems, you do what's called cross-linking, too. Cross-linking takes a considerable amount of heat, and you have two temperatures to be involved in.

One, to try the paper, and another one to cause this cross-linking. And the equipment at the Hazen laboratory that was available couldn't do it satisfactorily.

Q. Did you also do some work on this at Hazen? A. Yes. Hazen has a Geiger press with a small — the roll is that much in diameter, gravure cylinder, and you put little short pieces through and see the effect of laydown on the foil or paper.

Q. And do you recall approximately when it was that you felt that you had a water-based coating that would be acceptable? A. I believe it was in March of 1980.

Q. And at that point in time, what did you do? A. I told the Hazens about it.

Q. And anyone in particular, both Hazens? A. Tom. I worked almost exclusively with Tom.

Q. Did you take the product to Tom Hazen? [71] A. Yes.

Q. What did he say or do? A. He criticized it. And perhaps somewhat justifiably. It wasn't the finished product, but it was good enough to be presented, and he wanted some additional improvements on some of the process.

Q. And what did you do? A. I went there to the laboratory and kept on the process of elimination, and developed, got various additives to enhance the properties he wanted.

Q. And did you bring the product back to Tom Hazen?

A. Yes, I did.

Q. What happened on that occasion? A. He wasn't thrilled with it. He criticized it again. And eventually, we just ceased doing this routine.

Q. Now, this product, this coating that you have, at this point in time what would it have been used for at Hazen Paper Company in terms of its products? A. Actually in September of 1980, I had a product that was useful to replace the nitrocellulose and the vinyl.

[72] Q. Which goes in what? A. Foil. On foil and on some other films.

Q. And did there come a point in time when Hazen Paper Company did begin to use your coating on some products?

A. Yes.

Q. When was that? A. About the time of March, because the coating had a very thin —

Q. March when? A. 1980. Excuse me.

Q. Go ahead. A. It had a very thin amount on it; because the company didn't have to pay the profits from outside vendors to mix it, it had considerable economy.

Hazen at the time was making a product of gold and silver lacquer on foil. They called it Econosilver and Econogold. It was a bottom line product. It was sold without any quality guarantees. And as long as the coating adhered to the foil and got out the door, that was the product.

And initially, because of the economics involved with the coating, it was — that was the first use that it got in the company.

[73] Q. At this point in time they weren't willing to use it on anything else? A. No.

Q. And I take it from what you've just said that any additions to the other quality of the coating that you just described, that

this coating was less expensive than the other coatings?

A. Yes, considerably less expensive.

Q. Now, did there come a point in time when the product began to have greater acceptance at Hazen Paper Company?

A. The next thing that I recall was I went down to the machine floor one time and they were running a product called Birds and Bees. It's used for the spine on children's books, that the youngsters buy.

And one of the requirements of that particular product was to have an extreme amount of slip, because it had to be protected from scuffing with the rough use of children.

And one of the guys in the laboratory made a trial on his own with the water-based acrylic, Biggins' acrylic, and added a lot of slippage into it. It was so slippery you could barely hold it. Had a hard time wiping it up, but [74] it worked successfully and it was used from that point on for that application.

Q. And did it — was it acceptable and successful in that application? A. Yes, it was used from that point on.

Q. That was approximately when? A. In mid 1980's.

Q. Now, at some point in time, did the Hazens recognize that this product could be used for a broader applicability?

A. In September of 1981, I saw a memo, I got a copy of a memo from Tom to Bob Hazen and Steve Smith, who was Sales Manager at the time, telling him that the product seems to have some promise, and because of pressures of the environmental regulations coming down the road, he wanted to get it into the field.

And it was suggested that it be put into the pressure sensitive field, the sticky paper that I showed you earlier.

Q. Now, this coating that you had developed, did it have a name? A. It was called Biggins' acrylic.

Q. Who called it that? A. Tom Hazen.

[75] Q. Did anyone else? A. Everybody after that.

Q. Everybody where? A. In the company it was called Biggins' acrylic.

Q. Now, did you become involved in — well, let me ask you.

You said that the decision had been made to market this to the pressure sensitive industry? A. Yes. To try to get it into that field.

Q. What you're talking about here is what of the materials that you have there in front of you? A. This material.

Q. This is the material with the adhesive on the back? A. That's the market we were addressing.

Q. Ultimately goes to make stickers, and the ultimate customer, commercial customer prints on it? A. That's right.

Q. And did you become involved in the effort to market that product to the pressure sensitive industry? A. Yes.

[76] Q. In what way? A. The company had an agreement with a gentleman named Bob Hutchinson to handle all their production in this market.

And on his shoulders was the task of introducing it and getting it accepted by customers.

And you heard him referred to earlier. He did an outstanding job.

Q. Mr. Hutchinson, was he an employee of Hazen Paper Company? A. No, Mr. Hutchinson was an independent representative or broker. He would sell a product and Hazen would ship it to his customers, and then they would make arrangements about commission.

Q. Mr. Hutchinson was paid commission? A. Yes.

Q. Now, you were describing how you got involved in the effort to market this to the pressure sensitive industry.

A. The market is dominated by a company named Fasson. Fasson is located out in Ohio.

And Fasson is pretty sophisticated. They had a technical arm that evaluated all submissions and tested it rather severely. And if approved, then you could supply a test roll for [77] evaluation on their production department.

Mr. Hutchinson asked that I go with him to this technical department and discuss the properties that they saw were satisfactory, and submit samples of our paper.

Q. Did you do that? A. I did.

Q. And who did you meet with? A. I met two people. Marjorie Spicen, I think was one lady, and Scott Mingus, who actually did the testing.

Q. And I take it you went with Mr. Hutchinson? A. Yes, we went together.

Q. What was the result of this trip? A. We passed the test with flying colors. And they ordered a small roll.

Q. Fasson did? A. Fasson did.

Q. And what happened after that with respect to this market? A. It started to — they tested it, performed very nicely on their equipment. They sent it to customers in the field and it performed nicely by their ultimate customers, the printers, [78] and they started to use it.

MR. CAHILLANE: Your Honor, I now have some charts that I would like to show the jury and Mr. Biggins could identify the information on them, with the Court's permission.

THE COURT: Very well. If you could put them on the easel.

MR. CAHILLANE: Your Honor, if I may ask if the jury is able to see this adequately.

THE COURT: I'm sure they can.

MR. CAHILLANE: Thank you, your Honor.

THE COURT: Go ahead.

Q. (By Mr. Cahillane) Mr. Biggins, during the course of this litigation, have you been through our office provided with certain information about Hazen Paper Company's sales and products? A. Yes, I have.

Q. And as a result of that information, were you able to draw up for us with the aid of your computer a chart showing the use by Hazen Paper Company of your products? A. Yes, I was.

Q. During certain years? [79] A. From the time of my — when I invented it until 1989. Excuse me, 1986.

Q. Did you have any information about any other years?

A. No. My information stopped at 1986.

Q. The information that was supplied was what? A. Was pounds of resin purchased to make the water-based coating.

Q. I'm going to show you a document and ask you if you could identify this? A. Yes. This is the information that was supplied to us by Hazen Paper Company.

MR. CAHILLANE: Your Honor, I would like to introduce this as an exhibit.

THE COURT: Has counsel seen it?

MR. CAHILLANE: I'm sorry.

MR. MCGINLEY: No objection.

THE COURT: Exhibit 6 in evidence.

MR. EGAN: 6? I have 7, your Honor.

THE COURT: All right. So it will be 7.

MR. EGAN: Thank you, your Honor.

[80] Plaintiff's Exhibit 7 *marked in evidence.*)

Q. (By Mr. Cahillane) The diagram that you've done there, Mr. Biggins, the information on the diagram you actually have is a picture of what? A. Drums. I thought it would be easier to explain the drums purchased, the material, how it arrived at the company.

Q. The information here in and of itself does not say drums.

A. No, but one drum is 492 pounds. By converting the pound numbers to that, I drew the diagram.

Q. If you could explain this diagram in terms of the time when you were working on the product and its ultimate acceptance, and what happened beginning in I think the first year there, 1979. A. Right. That's when we purchased one drum. We had arrived at a coating on the machine that held promise, and we purchased one drum.

The following year, 1980, we purchased eight drums. In '81, we purchased seventeen drums. This represents when we started using the Econo grade.

[81] In 1982, this indicates the use for some of the pressure sensitive and for the Golden Books material.

In 1983, you can see there was a big jump. It started to be used by the pressure sensitive field. I believe that's about fifty drums. Maybe more.

Q. This is after your and Mr. Hutchinson's trip to Fasson?

A. Yes.

Q. And the following years, the use of the product I take it continues to increase? A. It shows the increase of the material. Substantial increase in 1986.

Q. And you were not provided with any of the information after that time period? A. No, I was not.

Q. Now, I would like also to show you another chart.

I ask you if during the course of this litigation you were also provided through our office with information — you were also provided information concerning the sales of the Hazen Paper Company? A. Yes, I was.

[82] Q. And on the basis of that information, did you give us the information in order to draw the chart? A. Yes, I did.

Q. Okay.

And this chart shows the — well, do you know what the blue bars are? A. That is total sales volume reported by Hazen Paper Company 1977 to 1989.

Q. Okay.

And 1977, is that when you started with the Hazen Paper Company? A. Yes, it was.

Q. And when was it that you were fired from the Hazen Paper Company? A. Right about there.

Q. 1986? A. 1986.

Q. Now, the sales when you began at Hazen Paper Company in 1977 were about how many? A. About eight million dollars.

Q. And by 1986, they were approximately how much?

A. Around thirty.

Q. In 1989? [83] A. Forty-two, 43 million dollars.

Q. You also have on that chart some red bars, which as we have explained, they are referred to as Hutchinson and Miller sales? A. Yes.

Q. Could you explain for us what that represents? A. This represents Mr. Hutchinson's commission, selling the Hazen products; the pressure sensitive line. Also includes a little bit of what the lottery ticket business is, too.

Q. Commission or sales made? A. Sales made. Excuse me.

Q. And in 1982, at the time that you were commencing to try and market that coating to the pressure sensitive industry, that was approximately how much? A. Between one and two million.

MR. MCGINLEY: May I interject here? I didn't hear what the foundation was for the Hutchinson, for the red bars, Mr. Cahillane.

MR. CAHILLANE: As to how we developed the information?

MR. MCGINLEY: The basis for that information.

[84]—THE COURT: Repeat it.

Q. (By Mr. Cahillane) Now, Mr. Biggins, during the course of this litigation, did you go with me to Sullivan and Hayes' office in Springfield to review certain documentation concerning Hazen Paper Company sales? A. Yes, I did.

Q. And included in that documentation was there a category or listing of the total sales made by Hutchinson and Miller on behalf of the Hazen Paper Company? A. It was available to us, yes.

Q. And based on that information, did you copy down the number, amount of sales that Hutchinson and Miller had done for Hazen Paper Company in the years 1982 to 1986? A. We did. Yes.

Q. Was this your basis for making this chart? A. Yes.

Q. And again, were you provided with any information after 1986? A. No.

Q. And if I may, where we left off, I believe you described where Mr. Hutchinson stood in [85] 1982; by 1986 when you were fired, approximately how much were those sales?

A. Approaching 10 million dollars' worth of sales.

Q. All right.

MR. CAHILLANE: I would like, your Honor, to offer each of the charts as exhibits.

THE COURT: All right. I thought they were already in.

MR. CAHILLANE: I don't think so. I offer them.

The raw document that was offered is not exactly the same thing, because he converted it to drums. This is not a picture of the chart.

THE COURT: That's 7?

MR. CAHILLANE: Yes. So this would be 8 and 9.

THE COURT: The others will be 8 and 9.

(Plaintiff's Exhibits 8 and 9 *marked in evidence.*)

MR. CAHILLANE: For the Court's information, your Honor, if it does not matter, this would be a convenient break-off point for us.

THE COURT: Are you on a new [86] subject now?

MR. CAHILLANE: Yes.

THE COURT: All right. Then we will recess until two o'clock this afternoon.

Jury may file out.

(*Recess taken.*)

* * *

[87] THE COURT: Plaintiff may proceed. Return to the stand.

WALTER BIGGINS, RESUMED

CONTINUED DIRECT EXAMINATION BY MR. CAHILLANE

Q. Mr. Biggins, I believe we left off with a period of time when you had developed this coating and it had gained customer acceptance.

Did you at any time at Hazen Paper Company have access to or see documents or records which indicated whether or not that product was profitable for Hazen? A. Yes. As a member of the Executive Committee, I had access to that information.

Q. What kind of information was that? A. It was a computer printout.

Q. And this computer printout would show what?

A. Showed just about everything about a product, broken down by individual run. The cost of the components. Cost of the machine time to produce it. And the percent profit.

Q. And did you see such computer printouts [88] for products made with your coating? A. I did.

Q. And do you know — and was there included in that information the percent profit for those products? A. Yes, there was.

Q. Do you know what that was?

MR. MCGINLEY: Objection to that, your Honor.

THE COURT: Well, if he knows.

How would you have personal knowledge of what it means?

THE WITNESS: Part of the technical functioning, your Honor, is to plan costs when you are developing a product. So it had impact on what I did.

Then that's how I knew what it was.

THE COURT: Did you have personal knowledge of what the figures meant?

THE WITNESS: This printout was very carefully labeled.

THE COURT: You may answer.

THE WITNESS: Around thirty percent.

Q. (By Mr. Cahillane) Now, with respect [89] to that coating or formula, did you receive any offers for it from anyone else, other than Hazen Paper Company? A. Actually I did.

Q. And when was that? A. After it was developed and seen in the marketplace.

Q. And who was it that made these offers to you? A. Several vendors. People that made coatings.

Q. And what were they offering you? A. Two in particular offered me an opportunity to sell it overseas.

Q. And what did you tell these people? A. I told them that it was completely unethical and I wouldn't do it.

Q. Now, did you also have other accomplishments at Hazen Paper Company with respect to other job duties that you had, Mr. Biggins? A. Yes, I did.

Q. Such as what? A. Investigating complaints, satisfying customers, on my own or with people that were responsible for selling.

[90] I was also responsible for quality control.

Q. What did that entail? A. That was probably the next test that I had to accomplish for a goal in the company, and I had to set up a program that was not in existence.

Q. And what did you do? A. Actually it's setting up a quality control program. It's rather involved.

Quality control program is only as good as the people who use it. And the people who use it are only as good as their awareness of what they do, and how it can affect the product and know how it's used ultimately, and develop self-esteem to have input and motivation to make good products.

Q. When you went to Hazen, what was the quality control system that existed at that time? A. The quality control program consisted of at night the orders came down from the office to the laboratory for the following twenty-four hours' production.

Attached to every order was a quality control sheet which listed items — no wrinkles, no bugs, no bumps, so forth. A little check mark beside it.

[91] When the order is received in the laboratory for the following day, the people in charge of quality control, they were color matchers, really very good color matchers, would check off all the sheets before it had even been assigned to that machine.

So the quality control in effect was done at four o'clock the day before the product was run.

Q. What did you do to change this? A. First off, I had to work with the people in the laboratory to acquaint them with the fact they had methods to judge quality and to measure it, and to control it.

And the biggest part was working with the machine operators, and the people on the floor at Hazen really responded very well to this quality control program.

I had to show them how the products were used. I had to make them aware of what was required to make these products satisfy a customer. I had to install process control systems for them to control the machines they were running to produce the product that was necessary.

As a matter of fact, that was so [92] successful that when I first arrived there, when a run was put on a machine, the operator started from ground zero and they had to determine all the setups on the machine to get a good product.

This required running some, a small part on the rewind, take a sample into the laboratory, have the quality control guy in the lab make a judgment, go back to the machine, make an adjustment, start the machine, get a sample. Sometimes this could take an hour or two, which is very valuable time on a production.

With the lottery business in particular, when I installed the quality control program, they could start the machine up and run about fifty feet of paper, take it to the laboratory and pass some very rigid tests, be right on the money, push the button and run, and the guys were delightful.

So we had to get people on the machine aware of what control, how to set it up and how to make the product. It got to the point where the operators would go in and run tests themselves.

Q. And the tests, did that involve color control? A. When you do any color, you do gold foil [93] or the printed design, color is very important.

The printed designs, particularly, when they are running, in order for cosmetic houses at Christmas, they probably take two or three runs on the machine, and paper was run continually. Sometimes around the clock.

And when it was sent to the person who made boxes with it, he will arbitrarily unpackage skids and he could take a roll from the beginning of a run and the end of the run, and if the quality control was not in control, it would be two different boxes. And if it ended up in Steiger's, he would have different colors, and it would reduce the appeal of the product.

So color matching was a very exacting science. They had people in the laboratory, particularly on the day shift who had extremely good color eyes. They were very, very good. They knew what to make, what adjustments to make in the color to produce the shade they wanted.

What they didn't have was a reference point. They would go from one roll and then the next time they took the end roll off the run and started the next run with it, or on a daily basis, so it was possible to make a drift.

[94] Early on in my career at Hazen I purchased a Hunter color meter that assigned values to various shades. Also to measure the intensity of color, whereby the people in the laboratory could assign a numerical value.

It was kind of humorous because when I introduced it, they resented it, and then they found out how good they were and they yelled like blazes when the bulb burnt out.

Q. Now, during this time period, in 1982 when the product, the coating you had developed had gained acceptance in the marketplace and it was being sold to Fasson by Mr. Hutchinson, what was your salary at the time, Mr. Biggins?

A. In the mid '80's, it was around thirty thousand.

Q. What was your starting salary at the Hazen Paper Company? A. I started at the Hazen Paper with an annual salary of \$26,000.

Q. And in 1983, when you were making around thirty thousand, I believe you said? A. Yes.

Q. Were you happy with that? A. No.

[95] Q. Why not? A. Because being a member of the Executive Committee I had access to figures. We would go to the monthly meeting, we would get figures of how well the profitability of the company was. And I could see that Mr. Hutchinson — I don't want to take anything away from the man, as I said he really was an outstanding salesman. But his salary was increasing in leaps and bounds, and he was making big salaries, six figures, hundreds of thousands of dollars on something that I had developed.

And I became annoyed.

Q. And what did you do about it? A. I requested a luncheon appointment with Bob and Tom Hazen to meet at the Yankee Pedlar.

Q. What happened at that meeting? A. I pointed out my contribution to the company and the water-base and many, many other product improvements I had made that were profitable and resulted in good quality.

I talked about the quality control program. And at that luncheon meeting they gave me a ten percent increase.

Q. No, up to that point in time, had you [96] previously received any merit increases? A. I never received merit increases at Hazen that I didn't have to beg for.

Q. Now, after that, in 1984, did you have another discussion with the Hazens about your salary? A. Yes. The increase, a nominal increase for the plant came through, and I was included.

I requested another luncheon appointment. We went through the same routine. I got eight percent.

Q. Were you happy with that? A. No, I was not.

Q. Why not? A. Because once again, I could see Mr. Hutchinson was going up in order of magnitude. He had gone from — well, one or two hundred thousand to over \$300,000 in profit, and I was staying relatively level.

Q. And did you do something about that? A. Yes. It was the custom for myself and Tom Hazen to meet on a weekly basis, and I gave him reports on the technical department. He gave me input on things that he wanted addressed.

We used to have them in his office and [97] it became so hectic with phone calls that he used to meet me at lunch, and discuss these things.

In July of 1984, after my last increase, I approached Tom Hazen at one of these meetings at the end of it, and I said I wanted to discuss something that was bothering me greatly. And I pointed out that I had to keep begging for money and getting measly increases, while Mr. Hutchinson's commissions were rising dramatically.

Q. This occurred where? A. This occurred at Kelly's Lobster House in Holyoke.

Q. And was there something in particular that you asked Mr. Hazen for? A. At that meeting, I told him that I thought I was worth a hundred thousand dollars minimum.

Q. And what did Mr. Hazen say? A. I can tell you the exact quote. He said, "I hear you."

THE COURT: What?

THE WITNESS: "I hear you."

Q. (By Mr. Cahillane) And did he say anything else? A. He told me that he couldn't give me the [98] money — the salary increase, what I requested in money. Nobody in the company, he said, was making that kind of money. Even Bob and himself weren't.

But he told me that he would be willing to give me a piece of the company in stock, and that I could — my fortune could increase as the fortunes of the company did.

I accepted it.

Q. Now, at that point in time, approximately what was your salary? A. I think it was \$44,000.

Q. And did Mr. Hazen indicate to you how much stock he was talking about? A. He told me he was making up the difference between my salary and \$100,000 in stock.

Q. Hundred thousand dollars being the salary that you had requested? A. Yes.

Q. Now, after you had agreed to that, did he say anything else? A. He told me he would have to talk with his accountants and his lawyers and work out a plan.

Q. Did he discuss the Biggins' acrylic with you at all?

A. Yes. As a matter of fact, he did.

[99] He said in return, he wanted me to sign my rights to the coating over to him.

Q. And what did you say? A. I agreed.

Q. Now, after that, Mr. Biggins, did you receive stock in the Hazen Paper Company? A. I did not.

Q. At some point, did you talk to Tom Hazen about this?

A. Yes, I did. I was very patient. I trusted the man. I thought he was a man of his word.

He had some personal family problems that were taking a lot of his attention and I was understanding of that. And so I let approximately a year pass.

Q. Did you talk to him about it again? A. Yes, I did.

Q. When was that? A. We had attended a Congressional hearing in Boston on the environment, particularly Superfund sites, and on the return trip I reminded him he had made a promise to me the previous year, and that I hadn't heard anything about it, and I was inquiring of the status of it.

[100] Q. What did he say? A. He told me that he was having some legal problems with it and it was in the hands of the lawyers.

Q. Now, after that, Mr. Biggins, were you involved in another development on behalf of the company? A. Yes, I was.

Q. And what did that concern? A. Up to that point, Hazen was unable to laminate clear film to paper and make a successful product, and I developed two methods for achieving this.

Q. Do you have a diagram here to describe this process? A. Yes, I do.

MR. CAHILLANE: Your Honor, I would like to ask once again if I could make use of the overheard projector.

THE COURT: All right.

Q. (By Mr. Cahillane) Now, this process you are talking about is called what? A. This is called a dry lamination process. Actually two processes, a wet and a dry lamination. [101] But this depicts the dry setup.

Q. How did this work? A. This is the same laminator that we had, but you have no paper at this end. All we have at this end is the film, or the foil. In this case, it was film.

And we pass it over the section that normally applied adhesion down to the machine, up to the gravure station, and applied some solvent-based adhesive to the film. At that point, the film that passed through the oven and came out the other end, and this nip point, we introduced paper that adhered to the adhesive-coated film, nipped it together, and wound it up.

Q. Now, do you have another diagram which describes this in more detail? A. Yes. One of the problems with this is the fact —

Q. If you could just give me an opportunity to show these to the Judge and Mr. McGinley.

THE COURT: You've been using the word lamination at will here. No one said anything, but I'm just — I don't know how many of the jurors may know what you're talking about. [102] What do you mean by lamination?

THE WITNESS: When you put one material against another with adhesive. That's called lamination.

You will see it in churches, they make it with the beams, they put lumber and glue, plywood, those are laminations.

When you put two, usually sheets, together with an adhesive.

THE COURT: All right.

Q. (By Mr. Cahillane) You were going to describe this diagram, I believe? A. Okay.

This particular diagram is that nip we were talking about.

Here's the paper coming in, like if you magnify it, it's very rough material.

And here's the adhesive layer on the film coming into here.

And as you see in the nip, you have holes — voids, where the adhesive doesn't flow in.

When you have a clear film and you laminate it to something, if you have a little bubble of air, it reflects the light and it — they call it a shiner. It glares at you. And every one [103] of these materials was a shiner.

And this is what Hazen had never been able to overcome. The solution was — I got this from my father who years ago made false teeth, and said if you want to get rid of air in anything, you soak it with water. So I introduced water.

If you introduce water to the area where the air is trapped, you don't allow it to get in this construction. Then you get rid of the dryness.

In this particular case, that adhesive I was talking about was a solvent-base, was a polyurethane, and moisture helped it to cure.

If an adhesive is not cross-linked and got tough, and the moisture helped it to cure, so the moisture here greatly increased the final property of the paper.

And what I did to do this, I thought it was rather novel, while we were running the paper and we were getting the shiners, I remembered what my father said.

I went to the bubbler, got a cup of water and threw it on the paper. Poured it right on the paper. It ran up to the nip and spread across, and from that day on, we never had another [104] shiner. All we had to do was keep a fine mist of water dropping onto the web, running into the nip, and we had a successful dry lamination.

Now, I mentioned what lamination — what lamination is, the normal lamination procedure, but the adhesive comes like in this end of the machine. When the foil or film will be wound together it made it extremely wet.

The drawback to this was it didn't dry out the processing through the machine because the moisture couldn't come through the film, which was on the top. So it wound up wet.

The manufacturing guys had fits because they had a roll of wet stuff. They had to wait probably a couple hours to see if it was successful. It always was. But that was a worry.

So because of the wetness of the roll, they requested I develop this system. So we had two systems to put Hazen into a new market that they had been excluded from for several years.

Q. Is that it for now with the diagram? A. Yes.

Q. Thank you.

Now, this development that you just described, Mr. Biggins, did this result in another [105] conversation with Tom Hazen about stock? A. Yes, it did.

Q. How did that come about? A. In December of 1985, I was in on a Saturday, I was in the office and Tom congratulated me on this achievement. He bragged that we had taken a mil-

lion dollars worth of our business from Hampden Paper Company, competitor up the street, and he said it opened a sizeable new market for Hazen Paper.

Q. And what did you say to him? A. I said thank you for the compliment, where's my stock.

Q. And did he respond to that? A. His response to the statement was: Oh, I got to take that off and dust — take that out and dust it off?

Q. Now, on that occasion or on the prior occasion that you described, did Mr. Hazen ever deny to you that he had promised you the stock? A. Never.

Q. And after that December 1985 conversation, did you receive stock? A. Never.

Q. After that December 1985 conversation, [106] did anything else happen in terms of your relationship with the company? A. I noticed a distinct change in their attitude towards me.

Q. They being who? A. Tom and Bob Hazen.

Q. And what was that change that you noticed? A. I used to travel off and on occasionally with Mr. Robert Hazen to a lottery ticket company, in particular, and we always traveled together on the plane. He got the window seat and I got the middle seat.

After this took place, he sat in one side of the section of the plane, and I sat on another, and I still didn't get the window seat.

THE COURT: Who did the planning?

THE WITNESS: He did.

THE COURT: That was the routine from the start?

THE WITNESS: That was the routine. He arranged the trip and got the tickets, and he usually gave them to me at the airport.

THE COURT: When you were last employed by the company, did you receive any salary [107] increase?

THE WITNESS: My final check, I got an increase, your Honor. After I —

THE COURT: Nothing during the previous year until your last check?

THE WITNESS: After I had been fired, they paid me my last check and there was an increase in it.

THE COURT: I'm asking for the previous year before you were fired, was there a salary increase or adjustment in your salary?

THE WITNESS: There was an annual cost of living that everyone got which occurred every year. Yes.

Q. (By Mr. Cahillane) Now, were there any other changes in the behavior of the Hazens after December of 1985? A. I ceased having weekly meetings with Tom Hazen.

Q. Now, in May of 1986, near the end of May of 1986, did something happen with respect to your employment at Hazen Paper Company? A. Yes, I was requested to come into the office on Saturday for a meeting with Tom and Bob. It was the Saturday of the Memorial weekend, the [108] 24th of May that year.

Q. Who had requested the meeting? A. Tom Hazen had asked me to come in.

Q. Did you go to this meeting? A. Yes, I did.

Q. And what happened at that meeting? A. I was taken aback. The opening statement was that the Hazens were outraged at my actions.

Q. Well, who was at the meeting, Mr. Biggins? A. Tom Hazen sat opposite me. Bob Hazen sat to my right, his back towards me.

Q. I understand you went into the meeting with Tom Hazen facing you, and Robert Hazen sat with his back to you?

A. Yes. Tom did the talking.

Q. Did Robert Hazen talk to you during this meeting?

A. No.

Q. Did he turn around and face you? A. Once very briefly.

Q. Now, what was it that happened at the meeting; what did Tom Hazen say to you? A. He told me he was outraged

with the [109] business that I had started with my son; he said it was an embarrassment to him.

He asked me to divest myself of ownership of the companies. To take the name off the W.F. Biggins Associates and to furnish him a list of customers, and he told me he was going to prepare a confidentiality agreement for me to sign.

And if this didn't come to pass, we would sever relationships.

Q. Now, you were, were you not involved to some degree in a business with your son? A. Yes.

Q. That was W.F. Biggins, Inc.? A. Yes.

Q. Was there another business, too, that he referred to?

A. There was a business we started two years previously called Proclamation.

Q. Was that in existence at the time? A. No, it had been dissolved.

Q. How long had it been out of existence? A. Oh, two years at that point.

Q. Now, you indicated that Bob Hazen — I'm sorry, Robert Hazen, Thomas Hazen at the meeting told you that they wanted you to divest your [110] interest in these businesses?

A. Yes.

Q. And that he wanted you to sign some sort of agreement?

A. Yes.

Q. Did he tell you what kind of agreement? A. He called it a confidentiality agreement, I believe.

He handed me a typical one. He didn't have one prepared himself.

THE COURT: What type of business was it that you had entered into with your son?

THE WITNESS: The one that was defunct at that point, your Honor.

THE COURT: The one that was in existence?

THE WITNESS: It was the compliance of Right to Know for small and medium-sized businesses.

THE COURT: Did it have anything to do with the business you were working under contract with the Hazens for?

THE WITNESS: It had nothing to do with their production or their profitability.

—One of my responsibilities was [111] compliance with the Government regulations, and one of the regulations I had to comply with was the Right to Know law. It was a nuisance to me, and I recognized that it was an opportunity for my son to start a business, serving people this way.

THE COURT: At the time you entered into the relationship with the Hazens, was there any kind of understanding that you were giving them full attention and one hundred percent of your time?

Was there anything mentioned about that at all?

THE WITNESS: No, no, sir. There wasn't.

Q. (By Mr. Cahillane) At that time, was Thomas Hazen aware of the existence of Proclamation and W.F. Biggins, Inc.? A. Yes, to avoid any embarrassment on his part, I told him about both ventures.

Q. When did you tell him about Proclamation? A. When I started in 1983, about the Summer of 1983.

Q. And when did you tell him about W.F. Biggins, Inc.?

[112] A. That was in 1985. Probably early Summer of 1985.

Q. Did you explain this to Mr. Hazen at this meeting?

A. Yes.

Q. And what was his response to that? A. He said that's fine, no problem at all.

Q. Now, before we go back to those companies, when you were at this meeting, you were to be given an agreement at some point? A. Yes.

Q. And after that, did you receive an agreement from Tom Hazen? A. I received an agreement dated May 30th, and was handed to me on June 3rd.

Q. June 3rd. Okay.

Now, did you also receive a memorandum or a letter with that? A. Yes, I did.

Q. I'm going to show you a copy of a document, and ask you if you can identify this? A. That's a copy of the letter of the company, the agreement.

MR. CAHILLANE: I would like to offer this in evidence.

[113] MR. MCGINLEY: No objection.

THE COURT: Exhibit 10.

(Plaintiff's Exhibit 10 *marked in evidence.*)

Q. (By Mr. Cahillane) Along with this memo, was there an Employee Confidentiality-Patent Agreement attached to it?

A. Yes, there was.

Q. I'm going to show you a copy of this document and ask you if you can identify this? A. Yes, that's the agreement.

Q. This is the agreement that was given? A. Yes.

MR. CAHILLANE: I would like to offer this into evidence, your Honor.

THE COURT: That was attached? Was it physically attached?

THE WITNESS: I think it was probably clipped to it.

THE COURT: It probably should be part of the same exhibit then. Exhibit 10.

MR. MCGINLEY: No objection, your Honor.

THE COURT: Why don't you refer to it specifically as 10A.

[114] (Plaintiff's Exhibit 10A *marked in evidence.*)

Q. (By Mr. Cahillane) Now, with respect to Exhibit 10, the memo, Mr. Biggins, that you received on June 3rd, does it not in the first paragraph ask for you to return the agreement at some point in time? A. It doesn't specify a time.

Q. First paragraph of the memo? A. Excuse me, yes.

Q. And what was your understanding at that point in time as to your employment situation? A. I recognized it was in jeopardy. I was perplexed.

Q. What was your understanding as to the relationship between this agreement and your employment situation? A. I think it was pretty clear that I had to sign it in order to stay at Hazen Paper Company.

Q. And what did you do with this agreement? A. I asked permission to have my family attorney look at it.

Q. Asked permission of whom? A. Mr. Thomas Hazen. I asked him if he would pick up the legal fees for this service. He [115] stormed out of my office and called me on the phone and said absolutely not, and hung up.

Q. Did you then give this agreement to your lawyer?

A. Yes, I did.

Q. And who was that? A. Mr. Dana Goldman.

Q. Mr. Goldman is an attorney here in Springfield?

A. Yes.

Q. I believe you said you had been given the agreement June 3rd, and told to return it signed by June 9th? A. Yes.

Q. And did you bring the agreement to Attorney Goldman?

A. Yes, I did.

Q. And did Attorney Goldman provide you with a letter advising you concerning the agreement? A. Yes, he did.

Q. I'll show you a copy of a document, and ask you if you can identify this. A. That's the letter that he sent with it.

Q. Okay.

MR. CAHILLANE: I would like to [116] introduce this as well, your Honor.

MR. MCGINLEY: Object to that, your Honor. Several reasons.

THE COURT: Let me see it, please.

(Bench conference held.)

THE COURT: Your objection?

MR. MCGINLEY: My objection, your Honor, is it's rank hearsay to begin with. It is a — as you can see, one of the paragraphs here, fourth one down, it's a personal recommendation for Mr. Biggins. The only way to find out is to cross examine Mr. Goldman as to how he can give that.

It's also a conclusion of law that may or may not be right, in which he opines that that particular agreement is in violation of the law.

THE COURT: That I see right off the bat.

MR. CAHILLANE: I'm not offering it for the truth of the matter asserted, I'm simply offering it to show that Mr. Biggins received certain advice.

THE COURT: The jury won't understand that.

Were you going to have Mr. Goldman testify?

[117] MR. CAHILLANE: I can, your Honor, if you wish. We have subpoenaed him and told him we might need him.

MR. MCGINLEY: I would stipulate that for purposes of trial, if he wants to ask did he see an attorney who gave him advice, without having to get into the specifics of the report.

THE COURT: Yes. All right. I'll exclude that.

(End of bench conference.)

Q. (By Mr. Cahillane) As a result of this, Mr. Biggins, did you have some time after between June 3rd and June 9th, or on June 9th, what was your understanding of the Employee Confidentiality and Patent Agreement that had been given to you by Mr. Hazen? A. That I gave him exclusive rights to everything I ever thought or dreamed. And I was prohibited from working for anybody after two years' cessation of the employment with Hazen Paper Company.

Q. Now, let me just — the first thing you mentioned, do I understand you're saying that it's your understanding that this agreement meant that you had to give the Hazens the right to — any [118] developments that you had made? A. Yes.

Q. And the agreement also had a provision which restricted what jobs you could hold? A. Yes.

Q. What was your understanding of that? A. That my sole effort was going to be with the company and no outside efforts whatsoever I could undertake without their express permission, which could be withdrawn at any time.

THE COURT: Your state of mind, let me ask you while you were employed with the Hazen Company. What was your opinion in your mind as to your working conditions?

What did you feel you were doing for them; did you think you could go to work for them, draw a week's pay, and then work for anyone else on the outside?

THE WITNESS: No, I didn't, your Honor. I did not.

THE COURT: Well, how did this change then? How did this agreement change from your working conditions through the years when you were working for Hazen?

THE WITNESS: No change. That's [119] why I agreed to sign it.

THE COURT: All right.

Q. (By Mr. Cahillane) With respect to those outside businesses, Mr. Biggins, when Proclamation was in existence, did you work full time at Hazen Paper Company? A. Yes.

Q. Forty hours a week? A. Yes, I did, more than that.

Q. While W.F. Biggins was in existence, did you work full time at the Hazen Paper Company? A. Yes, I did.

Q. And who primarily did the work for Proclamation? A. My son Timothy.

Q. Who did the work for W.F. Biggins Associates?

A. My son Timothy.

Q. Did you make any money from Proclamation, Incorporated? A. No.

Q. Did you make any money, had you in June of 1986 made any money from W.F. Biggins Associates? A. No.

Q. Had W.F. Biggins Associates at that [120] time made any money itself? A. They had — Tim had sold two accounts, yes.

Q. Now, getting back to the agreement here, did the agreement — was it your understanding that the agreement had any other provision as to what your options were if you left Hazen Paper Company? A. They — I had no possibility of working in a paper converter for two years.

Q. Now, what was your understanding as to what this agreement provided as to that? A. I don't understand.

Q. Well, did the agreement have a restriction on what you could do after you left the Hazen Paper Company, if you left the Hazen Paper Company? A. Yes.

Q. What was that? A. That I couldn't work for anybody that could be considered a competitor of Hazen Paper for a period of two years.

Q. Now, how old were you at this point in time? A. Sixty-two years old.

[121] Q. And was it in your own mind, did the provision have any significance to you? A. Yes, I realized that the market was very limited to somebody in their sixties. And that I was really signing away a lot of rights.

Q. Now, at that point in time, you were the — were you the head of the Technical Department at the Hazen Paper Company? A. Yes.

Q. How many people were in that department? A. There were three people that worked for me.

Q. And who were those individuals? A. I had a gentleman who was a color matcher. He prepared samples for submission to customers that sent in a piece of string or a button or something like that.

Q. What was his name? A. Peter Cleuh.

Q. And who else? A. There was a young lady who was a microbiologist from the University of Massachusetts, who was very experienced in computers. And she ran the color computer we had purchased two or three years previously.

[122] And then there was a fourth man who was — did incoming quality control, Al Sufoletti.

Q. Now, these individuals who also worked in the Technical Department, did they have access to the same information that you had access to in terms of Hazen's processes? A. Yes, they did.

Q. How old was Mr. Cleuh? A. He was high thirties.

Q. How old was Miss Manning? A. Low thirties.

Q. And how old was Mr. Sufoletti? A. About the same age.

Q. To your knowledge, as a member of the Executive Committee at Hazen and as the head of that department, did any of those individuals have restrictive agreements? A. They did not.

Q. Did any of those individuals have agreements similar to Exhibit 10A that you have right now? A. No, they did not.

Q. At that point in time, were any of those individuals being asked by Tom Hazen to sign any such agreement? [123] A. No, they were not.

Q. Now, after you had received the agreement and after you had contacted Attorney Goldman, what happened next with respect to this matter? A. I returned it to Thomas Hazen on the 9th as instructed with a copy of Attorney Goldman's letter.

Q. And did you have a meeting with Tom Hazen at that point in time? A. The following morning, we had a meeting.

Q. And what happened at that meeting? A. At this meeting, Mr. Hazen told me to sign the agreement.

I said that I wanted a companion agreement specifying salary, stock, so forth. And he said no. That was the only agreement that was going to last. That was going to stand.

And then I had essentially signed it unchanged.

Q. Now, this agreement that I have been proposing to you as Exhibit 10A, did it have any provision relating to compensation? A. I don't think so. No, it did not. No.

Q. Did it have any provision relating to [124] the stock promise that had been made? A. No, it did not.

Q. And you informed Mr. Hazen of that at this meeting? A. Yes, I did.

Q. And what was his response? A. He said he wouldn't consider anything about this agreement at that time.

Q. And if there was no agreement on the agreement, did he indicate what the result would be? A. He said that we would have to sever our relationship.

Q. Now, with respect to the severing of relationships, was there any discussion about your performance at Hazen?

A. Yes, there was.

I asked him if I had been a good employee. He told me I was loyal, and that I had given a hundred percent of my effort.

Q. Now, did you indicate at this meeting whether or not you would sign this agreement? A. I said I would be willing to

sign the agreement if the accompanying agreement was furnished. I had no problem signing it.

Q. The accompanying agreement being what?

[125] A. The definition of salary and stock plans.

Q. And at that time, did Mr. Hazen deny to you that he had ever promised you stock? A. No, he didn't.

Q. Now, how were things left at the end of that meeting?

A. He told me to call Attorney Fred Sullivan, who was a company labor law lawyer, and work out a severance agreement with him.

Q. Did you call Mr. Sullivan? A. I placed a call to Mr. Sullivan that day. I finally talked to him on Thursday of that week. Two days later.

Q. And what transpired in that conversation that you had with Mr. Sullivan? A. He informed me that it wasn't up to him to make the severance relations. It was up to the Hazen Paper Company. And we discussed, I guess, the agreement.

Q. Now, at this point in time, what was your understanding of your employment situation? A. At Hazen's?

Q. Yes. A. That I was on the payroll, but it was in [126] jeopardy.

Q. Did you then talk to Tom Hazen again? A. The following morning I received an unusual telephone call from Tom Hazen, offering me a job as a consultant with the company.

Q. Now, what was your understanding of what your status would be as a consultant? A. I didn't investigate the telephone call because I was coming into the office within a few minutes, and we could do it in person. I was very perplexed, though, why he was offering me a job as a consultant.

Q. Did you indicate to Mr. Hazen that you wanted to talk to him about the situation? A. Yes.

Q. And did you later? A. Yes, I was called in his office about 9:30 on that 13th of June.

Q. What happened at that time? A. He told me to sign the agreement, or I would be fired.

I told him I would be willing to sign it, but I had to have the financial agreement as well.

He said that there would be no changes [127] to the agreement whatsoever; it stood; to sign it.

Q. What did you say? A. I said I couldn't sign it without the agreement.

He told me to leave the building, get out, and come back after five o'clock and clean out my desk.

I said, "Are you firing me?"

He said, "I am not firing you. I don't know what I'm doing to you, but I'm not firing you."

Q. At that point in time, what was your understanding of the situation? A. No doubt in my mind, I was fired.

Q. Now, and did you ever return to Hazen Paper Company?

A. I returned at five o'clock, cleaned out my desk, locked the door, as I was the last one in the office, and left.

Q. Now, you had mentioned that Thomas Hazen had offered you a consulting arrangement. A. Yes.

Q. Was it your understanding that you would still be an employee if you did that? A. No.

Q. And at that point in time, this was [128] when, Mr. Biggins? A. On the 13th.

Q. Of? A. June, 1986.

Q. How long had you been with the Hazen Paper Company? A. Almost ten years. Nine and a half years almost.

Q. And did Hazen Paper Company have a pension plan?

A. Yes, they did.

Q. And what kind of plan or plans did they have? A. They had two plans. One was a retirement plan which the company donated to. The other one was stock, employee stock plan where they issued stock in the company to the employees.

Q. What was your status with respect to the retirement plan in June of 1986? What was your understanding? A. My understanding was that I was just a few hours away from being fully vested in both plans.

Q. And with respect to the retirement plan, do you know approximately how much money was [129] in that with respect to your account? A. Somewhere between sixty and \$70,000.

Q. And with respect to the other plan you mentioned, the employee's stock ownership plan, what was your status with respect to that in June of 1986? A. June of 1986, I thought I was hours away from fully vesting, but I was actually only ninety percent vested.

Q. How much money did you have in that? A. I think the figure I was at was about \$23,000.

Q. With respect to the retirement plan, as a result of your being fired in June of 1986, did you ever receive any benefits from that retirement plan? A. No.

Q. Do you have any right to receive any benefits from this retirement plan? A. No.

Q. At the time that you were fired?

THE COURT: Let me ask you a question, please. Sorry to interrupt.

When you said you had \$90,000 or sixty or \$70,000, I guess you said in the pension plan, [130] was that your money that had been taken out over the years?

THE WITNESS: No, it wasn't, your Honor.

THE COURT: None of that?

THE WITNESS: None.

THE COURT: How about the \$23,000 in the stock plan?

THE WITNESS: I don't think so, your Honor. No.

THE COURT: Everything had been put aside by the employer?

THE WITNESS: Yes.

Q. (By Mr. Cahillane) Now, on that day when you were fired, Mr. Biggins, were you paid your final pay? A. I was not.

Q. Did you ever receive your final pay? A. Yes, I did, in early July.

Q. And how did that come about? A. Attorney Goldman had written to Hazen Paper Company, requesting my final pay and my vacation pay for 1985 and 1986.

MR. CAHILLANE: And may I approach the bench, your Honor?

[131] THE COURT: Yes.

(Bench conference held.)

MR. CAHILLANE: Your Honor, I was going to at this time introduce a couple of letters.

One is from Attorney Fred Sullivan to Dana Goldman.

The other is from Mr. Goldman to Fred Sullivan on this subject of the pay, just as documentation as to what occurred.

I gather that there is going to be an objection in light of what happened before.

The major reason I wanted to put these in now was really economy.

THE COURT: Unless you stipulate to the pay that he did get or didn't get.

MR. MCGINLEY: Sure. We have given them access to the paychecks. We gave them all of this.

MR. CAHILLANE: Not the matter of information, it's a question of the fact that he didn't get any vacation. They had to fight for it.

And another angle on the vacation pay is its significance legally here in terms of the contract claim.

THE COURT: Simply ask him whether [132] he had his vacation pay or he had to fight for it and what were the circumstances. Put that in evidence.

MR. CAHILLANE: Thank you.

(End of bench conference.)

Q. (By Mr. Cahillane) Now, Mr. Biggins, you had indicated that you ultimately got your pay through Attorney Goldman?

A. Yes.

Q. Do you know how that came about? A. I believe the Hazens sent it to Mr. Sullivan, who sent it to Mr. Goldman.

Q. Speak up, please. A. I believe that the Hazen Paper Company sent it to Attorney Sullivan, to their lawyer, who in turn sent it to Attorney Goldman.

Q. Now, and that was sometime in July? A. Yes.

Q. And you had been terminated when? A. The 13th of June.

Q. Now, did you also in June of 1986, did you have any vacation time coming to you from Hazen Paper Company? A. I had vacation for 1985. I was entitled to three weeks. I had used three days. [133] And after the 1st of June I was entitled to my vacation for 1986.

Q. And when was the last time that you had used any vacation? A. I think I used a vacation day, a day of it in early 1986. A couple of days.

THE COURT: You sound like a certain Judge I know.

At the time you received your last paycheck, did you receive any severance pay in addition?

THE WITNESS: No, your Honor. I received 13/30th's of my last month's pay.

Q. (By Mr. Cahillane) With respect to the vacation, had you tried to take any vacation in 1986? A. Yes, I requested some time off in May, and was refused by Mr. Thomas Hazen.

Q. Now, did you receive when you were terminated or thereafter any vacation pay? A. None whatsoever.

Q. And what was your understanding as to why you did not receive that? A. Hazen had a policy that you were not entitled to vacation. Vacation was time off without [134] pay.

Q. And how did you learn of that policy? A. It was in the company handbook that had been given to me.

Q. Did you learn, did you hear anything about this policy at the time you were terminated or shortly thereafter? A. I believe it was in the letter, the letter accompanying my check from Mr. Sullivan to Mr. Goldman.

Q. You are saying Mr. Sullivan made reference to the company policy? A. Yes, he almost quoted it verbatim.

Q. I believe it was policy contained in a company handbook? A. Yes, it was.

Q. I'm going to show you a document, Mr. Biggins, and ask you if you can identify this. A. Yes, that is the employee handbook, Hazen employee handbook.

Q. And what is it you're holding in your hand; was this something that you had at Hazen? A. It was given to me at Hazen, yes.

MR. CAHILLANE: Your Honor, I would like to offer the original into evidence.

[135] THE COURT: All right.

MR. MCGINLEY: No objection.

THE COURT: 11 in evidence.

(Plaintiff's Exhibit 11 *marked in evidence.*)

Q. (By Mr. Cahillane) Now, you mentioned with respect to this policy, Mr. Biggins, that this was something that Mr. Sullivan had made reference to? A. Yes.

Q. And I'm going to show you a copy of another document, and I ask you if you can identify this? A. This is a letter dated June 23rd from Attorney Frederick L. Sullivan to Attorney Dana M. Goldman, Esquire.

Q. And in that, is it in this letter that Attorney Sullivan makes reference to this policy? A. Yes.

Q. And where is that? A. It's in the fourth paragraph.

Q. And what does that say?

MR. MCGINLEY: Objection.

THE COURT: Well, I'm going to allow the letter in evidence, because it comes from [136] the Defendant's attorney. And therefore, the attorney is speaking for the Defendant. I will allow that.

Go ahead. You may read it.

THE WITNESS: Vacation policy at the Hazen Paper Company clearly states that vacation is quotation marks, not earned, closed quotation marks. It is paid non-work time, payable at the time when the employee is off duty for that purpose. This is not accrued or vested by an employee.

MR. CAHILLANE: And I would like to offer that into evidence, your Honor.

THE COURT: That may go in as Exhibit 11 — I'm sorry, 12.

(Plaintiff's Exhibit 12 *marked in evidence.*)

MR. CAHILLANE: Your Honor, I would also at this time like to make use of the overhead again.

THE COURT: Very well.

Q. (By Mr. Cahillane) Now, that provision that Mr. Sullivan cited there, was that a provision that was contained in the employee handbook? A. Yes, it is.

[137] Q. And do you know where it was contained? A. On Page 8.

Q. Could you, Mr. Biggins, tell the jury what that provision provides? A. It says: Vacation is not earned.

THE COURT: Are you going to use this?

MR. CAHILLANE: For something right after this.

THE COURT: Go ahead.

THE WITNESS: Vacation is not earned, rather it is paid non-work time, during which period the employee is given time off with pay. To be able to meet our customer requirements, immediately before and after a vacation period, attendance on the day before and the day after vacation is required.

Q. (By Mr. Cahillane) Essentially the same provision that Mr. Sullivan had cited in this letter applies to you? A. Yes.

Q. Now, are you aware of whether or not the employee handbook also discussed criteria for an employee being fired?

A. Yes, it does.

[138] Q. Do you know where that is?

If it's helpful, if I could draw your attention to Pages 2 and 3. A. Oh, yes.

MR. CAHILLANE: And, your Honor, this is where I would like to use the overhead.

This is a copy of what is on there.

Q. (By Mr. Cahillane) And directing your attention, Mr. Biggins, to the last paragraph of the section entitled: Job Security, would you read what that says? A. When employees did not fulfill the company standards, they are [sic] counseled and told how to be an acceptable employee. Only those who jeopardize customer relations through outlandish gross violations of standards or failure to respond to repeated counseling are separ-

rated. In short, all we ask is that you do your job. That will keep the business coming in, and will keep you employed. During slow periods, the company has traditionally given everyone a minimum of forty hours.

Q. Now, up to the point in time when you were fired on June 13th, 1986, had Thomas Hazen or Robert Hazen indicated to you that you had done [139] anything to jeopardize customer relations? A. No.

Q. Had they engaged in any counseling with you? A. No, they did not.

Q. Had they indicated to you that you were not doing your job? A. No.

Q. Did they in those meetings that you had, have any comments on your job? A. To the contrary. They said that I was performing admirably.

Q. Thank you.

At this point in time, Mr. Biggins, what were your own intentions in terms of retirement and how long you intended to work? A. I was going to emulate my father, who is ninety-four years old now, and he worked until he was eighty-two. I intended to work as long as I could.

Q. Now, if I could just clarify a few matters regarding these outside businesses that Thomas Hazen was objecting to in his discussions with you.

Proclamation, Inc. was formed when? [140] A. In 1983.

Q. And how long was it in existence? A. A little over a year.

Q. Were you the one who formed that company? A. Yes.

Q. Why did you do that? A. To help my son.

Q. Why were you doing that to help your son? A. Tim had left the University of Mass. before getting his degree. And I thought it would be an excellent opportunity to give him a break in life. And I realized that it could be a very lucrative business.

Q. What was the business that Proclamation was in?

A. In the business of recovering dirty solvents from printing companies, automobile shops.

Solvents are a very common material used, and it gets dirty and the process has to be cleaned up, and traditionally, the

solvent was sent over the road and there are hazardous waste regulations, and the true solution, and it's coming true today, is for the generator to render his [141] hazardous materials non-hazardous, at his place of business.

Q. And this is what Proclamation was going to do?

A. This was going to clean up the equipment on the truck, and visit various places and clean up their dirty solvents on the premises.

Q. Was Hazen Paper Company commercially involved in such a business themselves? A. No, they weren't.

Q. Had you done something similar for Hazen Paper Company? A. Yes, I had constructed a still in Hazen's plant to recover their waste solvent and waste inks.

Q. And now, was Proclamation using a still or something of the same design? A. No.

Q. When you told Thomas Hazen about Proclamation, did he object to you doing this, your involvement in it? A. No. He told me he wanted ten percent of the take, though.

Q. And did he tell you anything about that after that? [142] A. The following day he came in and apologized. He said he had no claim to that whatsoever.

Q. Did he indicate to you in any way that that was a business that Hazen might want to get involved in? A. No. I discussed when I built his still, it was a very successful still. We had the only permit I think in America to take the residue from his still and put it into a municipal dump. Everyone else had to put it in a hazardous waste dump, and we had permission from the Massachusetts environmental people to put it in conventional dumps.

Q. Did Proclamation do any work for Sullivan Paper Company? A. Yes.

Q. Was it your understanding that Sullivan Paper Company was a competitor of Hazen Paper Company? A. Yes.

Q. To what extent? A. Sullivan Paper makes gift wrap for the consumer. They make small rolls that you buy at Christmas-time to wrap your Christmas gifts.

[143] They also make a line of coated paper that competes somewhat with Hazen Paper.

Q. Well, how much business did Sullivan Paper compete with Hazen Paper Company out of? A. Very little.

Q. How much business did Proclamation do with Sullivan Paper Company? A. I prevailed on Mr. Roger Sullivan to let me try the equipment at his plant.

We did three drums of dirty solvent and was satisfied that his waste stream was beyond our capability with the equipment.

Q. How much are we talking about in terms of dollars?

A. Four, \$500.

Q. And who did that work? A. My son Timothy.

Q. Now, with respect to Holyoke Card and Paper, did Proclamation do some work for that company? A. Yes.

Q. Was it your understanding that Holyoke Card and Paper was a competitor of Hazen? A. No.

Q. How much work did Proclamation do for [144] Holyoke Card and Paper? A. There is a story behind that.

We did — we kept the truck at their facility for, oh, approximately a year.

Q. How much income did Proclamation realize out of that?

A. A couple of thousand dollars.

Q. How much did you realize from Proclamation?

A. None.

Q. And Proclamation, Inc., I take it folded at some point?

A. Yes, it did.

Q. When was that? A. It was in 1984.

Q. 1984? A. Yes.

Q. Almost or approximately two years before your June 1986 termination? A. Yes.

Q. Now, with respect to the other company, W.F. Biggins, Incorporated, why was that started? A. Once again, I recognized that as Technical Direct[or] of Hazen Paper Company, when these laws came along, you had to get material safety data [145] sheets for all the chemicals you use, and you had to pre-

pare a written manual. You had to train your employees. You had to update the manual.

And when I did that, I was taking valuable time away from my abilities to develop product, and watch the technical aspects of the company. And I realized that there was going to be a place for someone who would offer this kind of services to small to medium-sized companies. Large companies can afford to put somebody on staff full time and concentrate on it. But small to medium-sized companies can't.

I recognized that as an excellent opportunity, and at that time there was one regulation that was required, and I suggested to my son Timothy that he get involved in that.

Q. Was this a business or a service that the Hazen Paper Company was involved in, providing commercially? A. No.

Q. Have they been as far as you know? A. No.

Q. Now, prior to your June 1986 termination, was Thomas Hazen aware of the existence of W.F. Biggins, Inc.? [146]

A. Yes, he was. I told him about it.

Q. And had he given you any objections about it as this time? A. No, he applauded my intention to help my son.

Q. And at some time in May of 1986, prior to your first discussion about the agreement and your termination, did something happen with Mr. Hazen with respect to W.F. Biggins, Inc.? A. Yes. Timothy had been invited to speak to the Association of Decorated Papermakers, part of a bigger association of the Pulp and Paper Institute, American Pulp and Paper Institute.

He had been invited to speak by Mr. Eric Fuller, President of Holyoke Card and Paper, who Timothy knew very well.

Timothy had been talking about the new venture with Eric, and Eric thought it would be a wonderful opportunity for Tim, and I served the Association very well, because the business world didn't realize fully what the full impact of the law was.

So he had invited Timothy to speak to this meeting.

I told Tom Hazen about it so he would [147] know before he went in there that Timothy was going to be speaking.

Two days later, I received a note on my desk that on consideration, he thought it would be better if Timothy didn't speak to the Association, and he had personally cancelled Timothy's appearance with Mr. Fuller.

Q. Now, he knew Timothy was your son? A. Correct.

Q. Did Timothy work for Hazen Paper Company?

A. No.

Q. Other than being your son, did he have any relationship with Hazen Paper Company at all? A. No.

Q. You say Mr. Thomas Hazen took it upon himself to call Mr. Fuller and cancel this arrangement? A. Yes.

Q. I'm going to show you a copy of a document and ask you if you can identify this? A. That's the document he laid on my desk.

Q. This is a note from? A. Thomas Hazen to me.

MR. CAHILLANE: I would like to [148] offer this, your Honor.

MR. MCGINLEY: No objection.

THE COURT: All right. 13 in evidence.

(Plaintiff's Exhibit 13 *marked in evidence.*)

THE WITNESS: It says: Walter, I have second thoughts about Tim speaking to API meeting. I have asked Eric Fuller to make other arrangements for Tuesday.

Q. (By Mr. Cahillane) Now, on the 14th of May, at the time that note was written, did Tom Hazen call you in to talk about this at all? A. That was on my desk. That's all I knew about it.

Q. Were you at that time or had you at this time made any money from W.F. Biggins Associates? A. No.

Q. Had you on behalf of W.F. Biggins & Associates, Inc. solicited any business from any competitor of Hazen?

A. Timothy did this exclusively.

Q. Now, the title of the company, W.F. Biggins, is your name?

* * *

[151] Q. And starting with Tom, if you can, when did that occur? A. He reminded me one time after he had given the Executive Committee some life insurance that it was costing him a lot more for my policy because I was so old.

Q. And did you also say that Robert also made a comment once? A. Yes. Around '85 or so, he had taken out membership in a handball court in Holyoke — in Chicopee, for the employees. And he told Malcolm Gesner and I it wouldn't do us much good because we were so old.

Q. [Who] is Malcolm Gesner? A. Malcolm Gesner was Vice President of Manufacturing. He was a year older than I. He's dead now.

Q. Now, who was it that replaced you in your job as Technical Director? A. A gentleman named Timothy McDonald.

Q. And do you know Mr. McDonald; have you met him?

A. Yes, I have.

Q. And do you know approximately how old Mr. McDonald is?

* * *

[155] Q. And how has that gone in terms of business?

A. There has been a lot of work, seventy, eighty hours a week, five days, anyway, sometimes six.

It's — I think it's starting to gel.

Q. And can you tell us from these W-2 statements what amount of income you have made since you were fired from Hazen Paper Company? A. In 1987, the total figure was \$26,100.00

In 1989 it was \$26,000.00

In 1988, \$31,425.00.

Q. And Mr. Biggins, with respect to the coating you have developed that we talked about originally, that we had the chart with respect to, do you know if that's still in use at Hazen Paper Company? A. To the best of my knowledge it is.

MR. CAHILLANE: That's all I have, your Honor.
 THE COURT: All right. Cross examination?
 MR. MCGINLEY: May we approach for a moment?

. . .

[July 17, 1990, Volume II, p 50] Q. Now, is it fair to say that you were satisfied with your salary at the Hazen Company up until the year 1983?

A. Yes, sir.

Q. Was it in 1983 then that you compared your situation, as I think you told the jury yesterday, to Bob Hutchinson?

A. About that time, sir; yes.

Q. You told that to Tom Hazen? A. Yes, sir.

Q. Basically, that Hutchinson was being paid a lot of money compared to what you were being paid? A. Yes, sir.

Q. Was there any discussion with Tom at the time about the expenses that Hutchinson would have to take away from the gross amount of money that he was receiving? A. He mentioned that, sir; yes, sir.

Q. Tom Hazen had? A. Yes.

Q. Was it your understanding at the time you first talked to Tom about it that Hutchinson was making a particular amount of money? A. Yes, sir.

. . .

[54] . . . the small amount of the increase that they granted me, after my luncheon with he and Bob earlier in the summer.

And I told him that I knew what Mr. Hutchinson was making selling my product, and that it was substantially greater than what I was earning.

And eventually got to the point — whether I offered it or he asked, that I thought my salary should be at least a hundred thousand dollars.

Q. How much were you making at this point, or what point in time are we talking about again? A. In July, I believe.

Q. Of 1980? A. 1984.

Q. How much were you making then? A. My salary for 1984 I believe was \$44,000, after the increase that was granted me in June, if I recall, sir.

Q. You also got a bonus every year from the Hazen Company, didn't you? A. Everybody did, sir. Everybody did.

Q. You're not counting bonus as part of your total compensation? A. No, I was making the distinction, sir, that with bonus and salary, I was making less than . . .

. . .

[56] . . . something dollars? A. Yes, sir.

Q. And after you told Tom that you felt you were comparatively underpaid to Hutchinson, what did he say? A. I remember the direct quote, "I hear you".

Q. Was that the extent of the conversation? A. No, sir. No.

Q. Please tell us the rest of it. A. When he said that, I assumed and I think correctly, that he acknowledged that my position was a fair one.

Q. Did he say that to you? A. I assumed from that statement, sir, that that's what he meant. Maybe I was wrong.

He then said to me that he couldn't pay me what I asked for in money, but he said he could give me the difference in stock in the company, and thereby make me — give me part of the business.

Q. Now, the difference in stock was the difference between what, your salary and Hutchinson's salary? A. No. My salary and the hundred thousand dollars I was asking for.

[57] Q. And was your understanding with — withdrawn.

Did Tom Hazen tell you he would give you cash to make up that difference? A. No, sir. He promised me stock in Hazen Paper Company to make up the difference.

Q. How did you arrive at the number one hundred thousand? A. It was — it wasn't a strict calculation. It was just an approximation.

Q. It wasn't a mathematical computation or anything?

A. No, sir.

Q. Now, at this meeting you had with Tom, where was it again? A. Kelly's Lobster House.

Q. Was anyone else present? A. In the restaurant?

Q. No. I'm sorry. A. Just the two of us.

Q. Did you make any memo of that conversation? A. No, I didn't, sir.

Q. Did you know how the stock was valued at the time at Hazen? [58] A. I hadn't the faintest idea.

Q. Did you know how many shares of stock you would have to receive to bring your compensation up to a hundred thousand? A. No, sir.

Q. Is it fair to say you didn't get into any specifics of — about the amount or evaluation of the stock at that meeting at Kelly's? A. That's right, sir.

Q. Did Tom tell you anything at this meeting about having to check with lawyers and accountants or anything of that nature? A. He said that was the next step, sir, yes.

Q. Did he say why he had to check with attorneys and accountants? A. No, sir.

Q. Was there any time limit put on when Tom was to get back to you? A. No, sir, there wasn't.

Q. Did he tell you at that meeting that he couldn't give you stock because then that would give you a vote in the privately held company, and he didn't want to do that? A. Not at that meeting, sir.

Q. Did he tell you that at some later time? [59] A. Yes, sir.

Q. When? A. On our trip back from Boston, sir.

Q. Again, in point of time, when would that have been?

A. In the Summer of 1950 — excuse me — 1985.

[Q.] That was December of 1985? A. No, I think it was summertime, sir.

Q. And where did you speak to him at that time? A. In his automobile, sir. He was driving up the Mass. Pike.

Q. Just the two of you again? A. Yes, sir.

Q. What was the conversation that time? A. I reminded him and asked him about the — how it was proceeding.

Q. What did he say? A. He said he was — like the statement about giving me a vote in the company, he didn't want to do that, and he was trying to get around it.

Q. So is it fair to say he turned down your request for stock during that conversation? A. No, sir. He just told me he was trying [60] to fulfill his promise to me for the stock.

Q. He indicated, though, that he was having some difficulty doing that? A. He had a problem, he said.

Q. Did you ask him about that again? A. No, I didn't. Not directly. No, sir.

Q. And you went and did you[r] work every day at that time at the Hazen Company? A. Yes, sir.

Q. Did you go up to Tom or Bob at any time up until this car ride back and demand money from them because you had produced a new water-based lacquer or coating? A. No, sir.

Q. Why not? A. I trusted them implicitly. I thought they were men of their word.

Q. You didn't use the water-based coating as the reason for why you should be given that raise, did you? A. I used that and everything else that I had accomplished for the company as a basis for it, sir.

Q. Nothing more, do I understand, was said about the stock promise as you say again until May [61] of 1986? A. No, sir. There was one other instance.

Q. When? A. December of 1985, sir.

Q. What happened at that time? A. That's when Tom Hazen called me into his office on a Saturday morning and congratulated me on my accomplishment for laminating film on this equipment.

He told me it had opened up a vast new multi-million-dollar market for the company.

I said thank you much for the compliment, where's my stock? I'm getting impatient. You promised me that in 1984, and I still haven't seen it. Don't give me congratulations, give me part of the company.

Q. What did he say? A. He said, "Oh, I got to take that down and dust it off."

Q. Did you believe that he had already concluded that he had told you that stock was not an option for you? A. No, sir. He kept the door open with a statement like that, didn't he?

Q. You think he just forgot? [62] A. No, sir. In retrospect? I don't think so.

Q. Then the next time you had a meeting or discussion about the increase about stock was on May 24th? A. Yes, sir.

Q. And that was the meeting where among other things, Tom and Bob expressed outrage, I think you used the word, about you[r] private businesses? A. Yes, sir.

Q. Now, let's talk for a minute about your private businesses.

I show you a brochure purporting to be W.F. Biggins Associates, Inc. brochure.

Did you prepare that brochure? A. My son and I prepared it together, sir.

Q. And that is the brochure advertising the existence and the capabilities of a company known as W.F. Biggins, Inc.?

A. Yes, sir.

MR. MCGINLEY: I offer that in evidence, your Honor, please.

THE COURT: All right. F in evidence.

MR. CAHILLANE: No objection.

* * *

[64] A. Yes, sir.

MR. MCGINLEY: I offer that in evidence, your Honor.

MR. CAHILLANE: Your Honor, I object. I think that we have some confusion about dates here.

This document is dated March 16th, 1988. Certainly not the time period you're asking him about now.

MR. MCGINLEY: I never asked when that was prepared. It speaks to this particular business.

THE COURT: May be allowed in evidence. G in evidence. (Defendant's Exhibit G marked in evidence.)

Q. (By Mr. McGinley) Mr. Biggins, excuse me.

At the bottom of the form there is a place for President, Directors and Officers? A. Yes, sir.

Q. Your name is prominently displayed at the bottom; is it not? A. Yes, sir.

Q. Is Timothy Biggins anywhere on this? [65] A. No, sir.

Q. Was he an Officer or Director of the company at the time? A. I suppose he was a Vice President.

Q. Why do you only suppose? A. Well, we were very informal. We were trying to make a living, we weren't worrying about organization.

Q. But his name is not on the Dun & Bradstreet report, is it? A. No, sir.

Q. Not as Vice President? A. No, sir.

Q. Not at all? A. Not at all.

Q. What was W.F. Biggins, Inc. set up to do? A. Initially, to help small and medium-sized companies comply with the Right-to-Know law.

Q. And what is the Right-to-Know law? A. It's a Federal and State law, two laws, that require that anybody having products in their work environment to which people are exposed, come in contact with in the course of work, containing more than one percent of a hazardous chemical, which [66] appear on lists for Massachusetts, two thousand chemicals, and for the Federal Government it's over sixty thousand chemicals, or any chemical that is a carcinogen that causes cancer present in more than a tenth of a percent in any product, it has to be on a material safety data sheet collected from the supplier.

The employees have to be told that it's present in the product and in the workplace, and they have to be told what a

material safety data sheet is; how to read it; how to protect themselves; how to recognize symptoms if they are exposed to it, and medical or first aid in case there is a problem.

Q. Did the Hazen Company require this Right-to-Know service? A. No, the Federal Government did, sir.

Q. I said did the Hazen Company require that Right-to-Know information be given to them — I'll rephrase it.

Did the Hazen Company require the services of someone who would tell them how to comply with the governmental Right-to-Know law? A. No, sir.

Q. So that there was no Right-to-Know officer at the Hazen Company? [67] A. Formally, no, sir. It was my responsibility, but I wasn't a formal officer.

Q. Were you in charge of the Right-to-Know part of it?

A. Yes.

Q. Of the Hazen Company? A. Yes, sir. Yes.

Q. So that you gave to the Hazen Company the knowledge that you have just imparted to the Judge and to the jury here now? A. Yes, sir.

Q. And when did you do that? A. I don't know when it was, sir.

Q. Was it before you formed the W.F. Biggins, Incorporated Company? A. Yes, sir.

Q. For how long were you the Right-to-Know officer at Hazen, approximately? A. I don't recall when it became a law. I honestly don't know.

Q. Now, had you ever done Right-to-Know work prior to doing this work at Hazen? A. Nobody had at that — prior to that time?

Q. Did you become proficient in the Right-to-Know area? [68] A. I read the regulations.

Q. Did you speak to any lawyers who were active in the field about it? A. No, sir.

Q. Did you ever, for example, meet with Fred Sullivan to discuss Right-to-Know? A. No, sir.

Q. Did he ever give you any pamphlet or papers on that subject? A. Not that I recall, sir.

Q. Did he ever meet you to discuss it with you? A. Not that I recall, sir.

Q. So you developed your expertise from reading books and treatises on this subject? A. My expertise is my background as a chemist, sir.

The application of the law I got from reading the regulations.

Q. That is, you had to learn the law in order to apply your chemical background to it? A. So I had to read the law, so I could see how to satisfy it, sir, yes.

Q. Now, you were going to do the same kind of work you did for the Hazen Company in this new [69] company of yours, W.F. Biggins, Inc.? A. No, Timothy was.

Q. You set up the company; did you not? A. Yeah, but Timothy was going to do the work, sir.

Q. And the brochure said W.F. Biggins, Associates, Inc.; doesn't it? A. Yes, it does.

Q. So when the company was set up, the work that was going to be done for it was the same kind of work that you had done for the Hazen Company? A. Yes, sir.

Q. Now, did you seek any business for your new company, W.F. Biggins, Inc., from any Hazen competitor? A. Me?

Q. Yes. A. No, sir.

Q. Did you approach anybody? A. No, sir.

Q. About this company? A. No, sir.

Q. Did your son Timothy approach anybody? A. Yes, sir.

Q. Do you know who? [70] A. I know some of them. I don't know the whole number that he did, sir.

Q. He did that on his own? A. Yes, sir.

Q. You had no part in it at all? A. No, sir.

Q. You didn't make an introductory phone call for him or anything of that nature? A. No, sir. It was on his own completely.

Q. Are you aware of whom he approached as you sit there now? A. Some of them.

Q. Who were they? A. Well, he started off by looking to the list of manufacturers, a thick book of manufacturers in Massachusetts, and writing them letters.

Q. Forgive me. I didn't want the whole general list.

Of Hazen competitors, do you know if he approached any of those? A. Yes.

Q. Who? A. Hampden Card & Paper. Holyoke Card & Paper.

Q. Holyoke Card was a competitor of Hazen? [71] A. No, sir.

Q. Didn't you just say they were? A. Pardon me, sir. I should clarify it. They are in the same business.

Q. They are in the same business, but they are not a competitor? A. They are a gravure printer. Yes, sir.

Q. Who else did Timothy approach? A. He approached Sullivan Paper.

Q. Is that a competitor of the Hazen Paper Company?

A. Yes, sir.

Q. Did he approach anybody else? A. I don't recall any others, sir.

Q. Who at Sullivan did Timothy approach? A. I don't know, sir.

Q. Did you approach Holyoke Card & Paper in the Spring of 1986? A. No, sir.

Q. Did you approach Eric Fuller particularly in the Spring of '86 and offer him the services of W.F. Biggins? A. I did not, sir.

Q. Did W.F. Biggins do work in this area, Right-to-Know, for Holyoke Card & Paper in the Spring [72] of 1986?

A. No, sir.

Q. I want to show you two documents, Mr. Biggins.

One is a three-page document, top one is dated September 19th, 1986, purporting to be a letter from you.

And the other seven, invoices purporting to be from Proclamation, Inc.

MR. CAHILLANE: May I have a minute to look through these before the next question?

THE COURT: All right. Go ahead.

(Short pause.)

Q. (By Mr. McGinley) Mr. Biggins, please look at the document I gave you dated September 19th, 1986, apparently signed by you at the bottom. A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Q. And is that a letter that you wrote to Holyoke Card & Paper in 19 — September 1986? A. Yes, sir.

Q. And does it relate to an invoice that you gave to Holyoke Card for services on May 12th, [73] 1986? A. It relates to an invoice sent to Holyoke Card on May 12th, 1986.

Q. And there is also a check, is there not, from Holyoke Card & Paper to the order of W.F. Biggins, Inc., on May 12th, 1986, in the amount of \$1,600? A. Yes, sir.

MR. MCGINLEY: I offer that in evidence, your Honor.

THE COURT: All right. Exhibit H.

(Defendant's Exhibit H marked in evidence.)

Q. (By Mr. McGinley) Let's go to the invoices I gave you starting in February 1984, March '84, April '84, June '84, July '84, September '84, and December '84.

Are these invoices, those from you — strike you — from Proclamation, Inc. to the Holyoke Card & Paper Company?

A. Yes, sir.

Q. Did you send those bills out? A. Proclamation did, yes, sir.

MR. MCGINLEY: I offer that in evidence, your Honor, as the next Defendant's [74] exhibit.

THE COURT: All right. I in evidence.

(Defendant's Exhibit I marked in evidence.)

Q. (By Mr. McGinley) I want to go back to the question I just asked you before I showed you these things.

Did you do any work for Holyoke Card & Paper in the Spring of 1986? A. On which company, sir?

Q. W.F. Biggins. A. No, sir.

Q. Let me refer you then to the document you have in front of you, which indicates that on May 12th, 1986, which would be the Spring of 1986, a bill for \$1,600 and a program was presented to Holyoke Card & Paper for which you, or W.F. Biggins, Associates, Inc., received a check for \$1,600. Isn't that true? A. This was a down payment. That was when Tim signed them up.

Q. Was there any work done at the beginning? A. No, sir.

Q. They were signed up you say as a client [75] in May?

A. Tim signed them up as a client in May.

Q. Did you have anything to do with that? A. No, sir.

Q. Now, with respect to Proclamation — A. Yes, sir.

Q. — there are several bills that I've just listed for you.

A. Yes, sir.

Q. From February '84 through December of '84? A. Yes, sir.

Q. Was that work done for Holyoke Card & Paper?

A. Yes, it was, sir.

Q. Were you — what kind of work was the Proclamation Company doing for Holyoke Card & Paper during that period of time? A. They were recovering clean solvent from waste ink and from wash-up materials, sir.

Q. And had you done that same kind of work at the Hazen Company previously? A. Yes, sir.

Q. And in fact, you set up, or Proclamation, Incorporated was set up, you set it [76] up, didn't you? A. With Timothy, yes, sir.

Q. When did you set up Proclamation, Incorporated?

A. It was in 1983 sometime, sir.

Q. And Proclamation, Incorporated was going to do the same type of work that you just indicated that you did for the Hazen Company? A. Yes, sir.

Q. And you did that same kind of work for the Holyoke Card & Paper? A. Timothy did, sir; yes, sir.

Q. Incidentally, this Proclamation bill, the ones over the periods of months, is that your handwriting? A. Yes, it is, sir.

Q. And each and every one of these bills from February, March, April, June, July, September and December, they are all in your handwriting? A. Yes, sir.

Q. You must have been the bookkeeper? A. Yes, sir.

Q. Do you know Roger Sullivan? A. Yes, sir.

Q. Who is he? [77] A. He is a member of the Sullivan family, now retired, who was in charge of manufacturing, I believe, at Sullivan Paper Company.

Q. Where is the Sullivan Paper Company located?

A. West Springfield, sir.

Q. Is the Sullivan Paper Company a competitor of the Hazens? A. Yes, sir.

Q. Did you call Roger Sullivan in 1984 to ask him to use the services of Proclamation? A. I called Roger Sullivan in 1984 to introduce him to my son Timothy, sir.

Q. Was that you or Timothy who called him in 1984?

A. We probably both did, sir. I don't know. I don't know whether Tim did or not. I did.

Q. Page 145 of the deposition, Mr. Biggins, you are asked the first day, were you asked this question and give these answer?

Now, did you call Roger Sullivan? Do you know who Roger Sullivan is?

Answer: Yes. Question: Is he an officer or management of the Sullivan Paper Company? Answer: Yes, he is.

[78] Is that a competitor of the Hazen Company?

Yes.

Did you call him in 1984 to urge him to use the services of Proclamation?

Answer: Tim did.

Question: You did not?

I did not call him. No.

Did you not tell us a moment ago that you did call him?

A. Yes, I did call him.

Q. Which is correct now, what you told me back in 1988 or what you just said now? A. Can I see what you're talking about?

Q. I'm sorry. Of course you can. Forgive me.

It starts there and goes to the top of the next page.

A. I stand by that, sir. I said I did not call him.

Did I have a meeting with Mr. Sullivan, Roger Sullivan?
Yes, I believe I did.

I didn't call him to get him to use — to buy the services of the company, I had lunch with him. And I introduced my son Timothy to him.

[79] Q. I just asked you a moment ago, I didn't ask you about all those matters, I asked you did you call him. You said you did.

But in your deposition I think you will agree you said you did not. Is that not correct?

A. Did you call him in 1984 to urge him to use the services of Proclamation?

Tim did.

You did not?

I did not call him, no, to use the services of Proclamation. Timothy did, sir.

Q. Is that what it says at the top of the second page?

A. I did not call him, no.

Did you have a meeting with Sullivan?

Roger Sullivan, yes, I believe I did.

Q. But the top of the second page that was just read, was: I did not call him, no. A. To offer the services of Proclamation, sir.

Q. Okay.

But you eventually met with him for lunch; is that correct?

A. Yes, sir.

Q. At the luncheon meeting, did you offer [80] the services of Proclamation? A. Timothy did, sir.

Q. What did you do during the lunch meeting? A. Introduced my son to Roger Sullivan, and my son made the presentation.

Q. You sat back and said nothing during the course of that luncheon? A. Oh, I might have said something, but it was Timothy's sales call, sir.

THE COURT: Are you about to start a new subject matter?

MR. McGINLEY: I have a couple more things on this area, your Honor.

THE COURT: All right. Finish this area and then we will take a break.

Q. (By Mr. McGinley) If I may, I would like to show you another statement from Proclamation, ostensibly to the Sullivan Paper Company.

Do you recognize that? A. Yes, sir.

Q. Bill from Proclamation to the Sullivan Paper Company?

A. Yes, sir.

Q. And the date of that is July 17th, 1984?

. . .

[87] A. Yes, sir.

Q. Who did you arrange that stipend with? A. The President of the company, sir.

Q. Who was that? A. Thomas Sullivan.

Q. Thomas Sullivan? A. Yes, sir.

Q. He's different than the Roger Sullivan I asked you about; is he not? A. Yes, sir.

Q. Did you ever tell Tom Hazen that Proclamation or W.F. Biggins, Inc. would be doing work for his competitors?

A. No, sir.

Q. Do you know Hampden Paper? A. Yes, sir.

Q. Where are they located? A. Holyoke, sir.

Q. Are they competitors of the Hazen Company? A. Yes, sir.

Q. Incidentally, did you apply to Hampden Paper for a job before coming to Hazen? A. No, sir.

Q. Did you offer the services of W.F. [88] Biggins, Inc. to Hampden? A. No, sir.

Q. Did you offer the services of Proclamation to Hampden? A. No, sir.

Q. Did you ever contact anyone at Hampden Paper concerning work by Proclamation? A. Yes, sir.

Q. Who? A. Ken Scott, sir.

Q. And how did you approach Mr. Scott? A. I called him on the phone, sir.

Q. Did you meet with him? A. Yes, sir.

Q. When was that? A. I don't know. It must have been in 1984, sir.

Q. Did you ever write him a letter? A. I may have, sir. I don't know.

Q. Let me show you this letter.

I ask you whether or not you wrote this September 13th, 1984 letter to Ken Scott at Hampden, soliciting business for the Proclamation Company? A. Yes, sir, I did.

MR. MCGINLEY: I offer this, your [89] Honor, in evidence.

THE COURT: All right. Exhibit K in evidence.

(Defendant's Exhibit K marked in evidence.)

Q. (By Mr. McGinley) Now, when you wrote to Ken Scott on September 13th, 1984, you thanked him for permitting you to demonstrate your — our process, I think you called it?

A. Yes, sir.

Q. What process was that? A. That was the solvent recovery process.

Q. You finished the letter by asking whether you can consider Hampden Paper as a new customer? A. Yes, sir.

Q. September 13th, 1984, you were still employed by the Hazen Company; were you not? A. Yes, sir.

Q. Did you ever offer the services of W.F. Biggins to Hampden Paper Company? A. No, sir.

Q. Did anyone ever offer the services of W.F. Biggins to the Hampden Paper Company?

MR. CAHILLANE: Objection.

* * *

[96] . . . couple days. He said some days short.

MR. MCGINLEY: Thank you, your Honor.

Q. (By Mr. McGinley) Some days short? A. Yes, sir.

Q. Now, is that a correct statement? A. May I qualify that, sir?

Q. I wish you would.

A. It depends on the reference. And I've had several discussions with several people about that, sir.

Q. Well, didn't the Hazen Company send you over to their retirement expert to find out exactly how long and how much you would have in that particular plan?

Didn't you go over there? A. Yes, sir.

Q. To the Pension Associates and ask them? A. Yes, sir.

Q. Weren't you eight months shy of your pension vesting?

A. That's what he said, sir. Yes, sir.

MR. MCGINLEY: No further questions.

THE COURT: All right. Redirect?

* * *

[124] . . . Hazen in June of 1986? A. Yes.

Q. And were you involved in an inquiry that was sent by the Department of — Division of Employment Security to Hazen Paper Company concerning Walter Biggins? A. Yes.

Q. Did you have to get financial information to fill in in responding to that inquiry with regard to Mr. Biggins's wages?

A. Yes.

Q. And did you also have to fill in the reason for his separation? A. Yes.

Q. And whether or not the separation was partial, temporary or permanent.

Now, is it fair to say at that time you had no information with regard to why Walter Biggins left the company yourself?

A. That's correct.

Q. And you had to go to someone else to get that information? A. Yes.

Q. And to whom did you go, ma'am? A. Mr. Hazen.
 [125] Q. Which Mr. Hazen? A. Mr. Thomas Hazen.
 Thomas Hazen.

Q. See if you can identify your signature on that document. A. That is my signature.

Q. Can you identify that document? A. Yes.

Q. And when did you send that to the Commonwealth of Massachusetts, Division of Employment Security? A. I believe there is a seven-day limit. It has to be in the mail within seven days, so I generally prepare these very quickly and mail them out within a day.

Q. And do you know what the purpose is of the inquiry?
 A. Yes, it is.

Q. Is to determine whether or not the applicant is eligible for unemployment benefits? A. Partly, yes. I guess to open up a claim, and this is part of the procedure.

Q. Can you tell from the date when you signed and sent this back to the Division of Employment Security? The date would be the second line under your name. [126] A. June 30th, 1986.

Q. And in order to find the reason for separation, the correct box to check, you went to Thomas Hazen? A. Yes.

Q. Okay.

The reasons that the State gives you to check is lack of work, voluntary quit, discharge, labor dispute or other; correct? A. Correct.

Q. And what did Thomas Hazen tell you to check?

A. Voluntary quit.

Q. Ma'am? A. Voluntary quit.

Q. So far as you advised the State, based upon what you were told by Thomas Hazen, Walter Biggins voluntary quit his position at Hazen Paper Company? A. That's correct.

MR. EGAN: I would like to offer that, your Honor, please.

THE COURT: May go in as Exhibit 18.

MR. MCGINLEY: No objection, your ...

* * *

[180] to Schedule 2 that you showed, you have one item called pension plan overfunding. A. Correct.

Q. And you have an amount of forty thousand dollars for '83 and '84; and it skyrockets to 366,000 in '85 and continues to 348,000 in '86, 421,000 in '87.

What are those numbers, pension plan overfunding?

A. Those are coming from the footnotes to the financial statements.

Q. Well, do those numbers indicate monies that the Hazens had put into their pension fund? A. Yes. That's correct.

Q. And it looks as though they were putting more and more money into the employees' pension funds as the years went by?

A. More money than was required to satisfy the actual actuarial liabilities of the plan at those points in time.

Q. They were putting in even more money than that?

A. That is correct.

Q. Thanks, Mr. Moriarty.

THE COURT: All right. Redirect?

* * *

[July 18, 1990, Volume III, p 12]

ROBERT HUTCHINSON, SWORN

DIRECT EXAMINATION BY MR. CAHILLANE

Q. Could you state your name, please? A. Robert Hutchinson.

Q. What is your residential address? A. 31 Buttonwood Lane, Doylestown, Pennsylvania.

Q. How old are you? A. I'm sixty-eight.

Q. What is your present occupation? A. Manufacturers' representative.

Q. And could you explain to the jury what that is? A. Yes. I think this is important.

We are direct commission agents for several different companies.

And what that means is that we have contracts with five different companies, and with those five different companies, we sell their products. We are their sales arm, and we just sell their products. We get commissions from each one of these companies.

THE COURT: On the product you sell?

* * *

[35] CROSS EXAMINATION BY MR. RANDALL

Q. Mr. Hutchinson, there's been some discussion in your direct testimony about being a manufacturers' representative; there has been testimony about the kinds of commissions that your company earned.

Could you tell us what kind of expenses are associated with being a manufacturers' representative?

What does it cost you to perform this function, aside from the risk you may do it and not get paid, what does it cost you regardless of whether or not you get paid? A. I'm glad you used the word risk, because it is a high risk business. Because if you lose one line, it takes a big cut out of your income.

And as I made comment earlier, we cover North America. We travel from Seattle to San Diego to Dallas, Texas, to Fort Myers, Florida, which is my territory. To Montreal, to Maine, to Toronto.

And our expenses are very, very high. We exceed the standard, if there is such a standard. We are most unusual in that we have found that we are the only manufacturers' representatives [36] in the pressure sensitive industry that travel a whole — the whole United States and Canada.

Most commission agents, most of the manufacturers' agents travel a territory, and the territory could consist of either a state like the State of Massachusetts, or Massachusetts, New Hampshire, Vermont and Maine. And that is a territory.

So when you ask that question, there is no relationship between what a territorial rep costs are and our costs. And our rule of thumb basically is that one of our prime principals pays for our travel, and the other one pays for our income.

So when you ask that question, it varies. It can vary all over the —

Q. First of all, how many sales people do you have working for you? A. Well, up until a month ago, we lost a salesman, we had four sales people on the road, including myself.

Q. So four on the road, and you have had a salary for each of those; is that correct? A. I beg your pardon?

Q. You paid a salary? A. Salary and bonus.

[37] Q. What would it cost you approximately in dollars and cents, what would it cost you a year to put one of those people out on the road? A. Just on travel expenses alone, just travel expenses, it's renting a car like for coming up here, that sort of thing, is nevertheless twenty-five thousand dollars. That's just for airline tickets and rental cars.

Q. Twenty-five thousand dollars per salesman? A. Per salesman.

Q. You then have the salary, bonus on top of that?

A. Retirement, Social Security, health plans.

THE COURT: Does that twenty-five thousand include hotel and food and all of that business?

THE WITNESS: It's really more than that. It's basically the travel expenses, the food is the minor part of our expenses. Entertainment is high.

THE COURT: You take customers to dinner, that sort of thing?

THE WITNESS: Yes. That's at least [38] another five to ten thousand dollars a year.

Q. (By Mr. Randall) Do you have any rental expense?

A. Yes.

Q. Office expense? A. Yes, yes.

Q. Now, I'm sorry, I interrupted you. Go ahead. A. No, I'm saying yes.

Q. Yesterday there had been some testimony, either yesterday or the day before that your office was in your home.

Now, is your office located in your home? A. No. It has not been for many years.

Q. Has Mr. Biggins ever been to your office? A. Yes.

Q. Do you represent or do you sell all the Hazen product line? A. We are permitted to sell all of the Hazen Paper product lines, yes, sir.

Q. I know you're permitted to, but do you in fact do that? A. No.

Q. Are you familiar with the Hazen Paper Company's competitors in the product lines you don't . . .

. . .

[40] . . . pull the masking tape off.

So that's basically it. It was a converter. It's a converting field. Treatment of paper.

Q. When you were at W.R. Grace, did you have a non-competition agreement with them? A. Yes.

Q. For how long a period of time was that? A. Two years.

Q. And do you even have one with your own company now, Hutchinson and Miller? A. Yes.

Q. How long a period of time is that? A. Two years.

Q. So if you leave Hutchinson and Miller, you can't compete with your own company for two years; is that right? A. I better not.

Q. In your experience in the industry and the traveling you do, is that fairly common in the paper converting industry?

A. Yes.

Q. The products you sell for Hazen Company, we have heard his Honor talk about the lottery tickets, so forth; those lottery tickets used this . . .

. . .

. . . [51] memory when approximately that was?

MR. CAHILLANE: Your Honor, I'm going to object on the grounds that this was not covered in direct.

THE COURT: Well, it wasn't, but he could easily use him as his own witness, so let's save time. You can bring him right back again as your own witness.

MR. RANDALL: Thank you, your Honor.

Q. (By Mr. Randall) Well, Mr. Hutchinson, let me try and pin it down.

Was he still at Hazen Paper Company when you had that discussion? A. Yes.

Q. And could you tell us what the discussion was, content of it? A. That he had come up with a process which he thought was a great idea for portable solvent recovery system.

And the way he had explained it to me was that on this — on a truck bed, he could put — he had equipment that he could drive up to an ink company door or somebody who uses ink and reclaim the solvent.

They would bring their ink to the truck [52] and through the — through the system that he had, recover the solvent.

Q. And did he discuss anything else with you about that during the conversation?

Did he ask you to keep that information confidential?

A. Yes.

MR. CAHILLANE: Objection, your Honor. If he is treating him as his own witness, I don't see how he could lead this way.

THE COURT: Stay away from leading questions.

Q. (By Mr. Randall) What else was said during that conversation; what else did Mr. Biggins say to you? A. You've already indicated what he did ask me, to keep it in confidence, and I did state that I would. And I did.

I absolutely did, until I was aware of this trial.

Q. You've been in the paper converting business for a good number of years; you testified twenty-four years as a salesman, and before that you were with W.R. Grace.

Are you generally familiar with . . .

* * *

[57] REDIRECT EXAMINATION BY MR. CAHILLANE

Q. You were asked by Mr. Randall about non-competition agreements, Mr. Hutchinson.

You indicated that you had one yourself with your company, and that you felt that the two years that you had might well be typical, at least in your business? A. Yes, it is.

Q. Would it be typical in that business for you to have a different period of non-competition for a younger person, if they had such an agreement? A. The format we used, we belonged to an organization called Manufacturers Agents National Association.

And this group is consistent of somewhere between ten and fifteen thousand manufacturers' representatives. And they have a specimen recommendation for non-competition agreements, subagents, you know, that sort of thing.

And so we took that as the format we use, and obviously, for agents, that was the acceptable thing.

We didn't question it, because it followed the same non-competitive agreement we had, I [58] had with them.

Q. Was there any recommendation on there that there should be a shorter or longer period of time for older people?

A. No.

Q. As a matter of fact, does your son work for you in the business? A. Yes.

Q. Does he have such an agreement? A. He sure does.

Q. Did you give him a different non-competition time? A. No.

Q. How many younger accounts do you service, Mr. Hutchinson? A. Accounts?

Q. Aside from Hazen, I'm talking about people. A. Principals, four other principals.

Q. So you have a total of five, including Hazen? A. Yes.

Q. Now, you mentioned you had discussion about the value that's added to the product as it goes along in the process, and the significance of . . .

* * *

[63] A. W.F. Biggins.

Q. Entity you actually work for? A. A company named W.F. Biggins, Associates, Incorporated.

Q. And in June of 1986, at the time your father was fired, was that your occupation at that time? A. Yes, it was.

Q. And approximately in June of 1986, how long had W.F. Biggins, Associates existed at that point? A. Almost one year. Started in 1985, the Summer of 1985.

Q. And prior to the time that your father was fired, who worked for W.F. Biggins, Associates? A. Myself.

Q. And anyone else? A. No.

Q. Did your father do any work for W.F. Biggins, Associates prior to June of 1986? A. Yeah, he would help me on certain necessities of getting the business ready.

In fact, it was kind of a family effort.

Q. Approximately how much time are we talking about, on your father's behalf? [64] A. I was lucky if I could get something out of him on the weekends, some time on the weekends.

Q. Now, up until the time your father was fired in June of '86, did your father receive any income or pay from W.F. Biggins & Associates? A. No, he did not.

Q. Up to that point in time, did you receive any income or pay from W.F. Biggins, Associates? A. No, I did not.

Q. Did your father prior to June of 1986 solicit any customers for W.F. Biggins, Associates? A. No, he did not.

Q. Did you solicit customers? A. Yes, I did.

Q. And did you in fact have records of the work you did in terms of soliciting customers for the business? A. Yes, it was

my — you know, I was still new at doing sales, so I was keeping very close records on everyone I was making calls on, or calling on the telephone.

Q. And when you say making calls on or calling on the phone, what do you mean by making calls; talking in person?

[65] A. In a personal appointment with someone at a particular company.

Q. Do you know approximately how many of those you made prior to June of 1986? A. Maybe fifty companies, fifty visits.

Q. And in terms of phone calls, about how many are we talking about? A. I'm not really sure. Hundreds, I'm sure. I'm not really sure.

Q. Did you keep records of all of those persons or phone calls? A. Yes, I did.

Q. And do you have those with you here today? A. Yes, I do.

MR. CAHILLANE: Your Honor, I would like to offer the records of the personal calls that Mr. Biggins made.

MR. MCGINLEY: I would like to see them, your Honor.

THE COURT: Show it to him.

MR. CAHILLANE: I did not intend to offer the records of the phone calls because they are quite voluminous, and perhaps not accumulative, but perhaps overkill to put all that in.

[66] MR. MCGINLEY: May I have a brief voir dire, your Honor?

THE COURT: You will be able to cross examine him on it.

MR. MCGINLEY: Shall I wait until then?

THE COURT: Sure. I will allow them in evidence, de bene, at least. 24 in evidence.

(Plaintiff's Exhibit 24 marked in evidence de bene.)

Q. (By Mr. Cahillane) Of those approximately fifty personal calls that you made, did it include the Sullivan Paper Company? A. Yes, I believe it did at that time.

Q. Did it include Holyoke Card & Paper? A. Yes, it did.

Q. And did it include Hampden Paper Company? A. Yes, I believe so.

Q. Now, in May of 1986 were you scheduled to speak at an early May 1986 meeting, were you scheduled to speak at a particular meeting? A. Yes, I was.

Q. And what meeting was that? A. The API meeting.

Q. What is API? [67] A. It was a division of the API, the Decorative Printers Division. I'm not sure of the exact meaning of Associated Printers.

Q. What is the group that you were talking about? A. It's a collection of people who are in the printing industry.

This particular division of the group would be those who would be doing decorative paper printing, or paper converting by applying decorative print to paper.

Q. I take it from what you're saying is that these different companies have meetings together? A. Yes, they do. They have an annual meeting as I understand it, and maybe special meetings on occasion.

Q. And how did it come about that you were scheduled to speak at this meeting? A. I was asked by Eric Fuller to address the meeting, since I had presented him our program on a sales call. That would be W.F. Biggins, Associates, Incorporated program for complying with the new Right-to-Know law.

He felt that my expertise would be [68] valuable for him and his competitors in the industry, as far as their compliance with this new up and coming regulation.

Q. He wanted you to share the information with them?

A. That's correct.

Q. Now, who is Eric Fuller? A. He is the President of the Holyoke Card & Paper Company.

Q. Now, did you learn at some point that you were not going to speak at that meeting? A. Yes, I did.

Q. How did you learn that and what did you learn? A. I received a call from Eric Fuller, telling me not to show up at the meeting because he had been asked by another member to prevent my speaking at the meeting.

Q. Did he tell you who that was? A. Yes, he did.

Q. Who was it? A. It was Thomas Hazen.

Q. Did your father after he was fired in June of 1986, later join W.F. Biggins, Associates? A. Yes, he did.

[69] Q. And when was that? A. It was after, about a month after he got fired. Sometime in July.

I made him an offer he couldn't refuse.

Q. Now, are you also familiar with a company called Proclamation, Incorporated? A. Yes, I am.

Q. What was Proclamation, Incorporated? A. It was a company which had developed, or developed a system to reclaim printing inks and printing solvents.

Q. And what was — when was this company formed, if you know? A. In 1983.

Q. And what was your relationship to the company? A. I was Vice President of the company.

Q. And starting in 1983, who worked for Proclamation, Inc.? A. I did.

Q. Did anyone else? A. No.

Q. Did your father do any work for Proclamation, Inc.?

A. He came up with the initial design on the [70] system, and would once in a while hold a wrench for me or something on weekends or something like that. But that's about the extent of it.

Q. Who built the system? A. I did. Initially it was constructed, I oversaw the construction of the initial design of the system at a private engineering corporation in West Springfield.

But subsequent revisions of the hardware, so forth, I did all the work on it.

Q. And how long was Proclamation in existence? A. Just approximately one year. Maybe a little bit over a year.

Q. So it stopped business in approximately one year?

A. End of '84.

Q. And did Proclamation make any money? A. No.

Q. Did you make any income from Proclamation? A. No, I took no income.

Q. Did your father make any income from Proclamation, Inc.? A. No, he did not.

* * *

[77] ... a little over a year? A. That's correct.

Q. Don't you use those anymore? A. No, and — no, I do not use them anymore.

Q. Okay.

When W.F. Biggins, Inc. was formed, I think you told us you were an officer of that corporation? A. Yes, that's correct.

Q. Now, let me show you the Dun & Bradstreet report again.

You're not listed on this as an officer; is that correct?

A. This is the first time I've seen this.

Q. Take your time to look at it. A. Thank you.

No, it seems they have just listed the chief executive officer.

Q. Mr. Walter Biggins? A. That's correct.

Q. Thank you.

Now, you didn't make any money I think you told us from the W.F. Biggins, Incorporated; is that a correct statement?

A. Not for which time?

* * *

[95] A. Yes.

Q. What did you talk about? A. I mostly listened.

Q. What did he talk about? A. Walt was upset. He was — he felt that he wasn't getting his fair share of the business that he had developed this particular acrylic coating.

THE COURT: With reference to time, when did this trip occur?

THE WITNESS: June of 1985.

THE COURT: 1985?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: And I remember Walt going on about that he had asked for a raise, and nothing really had happened.

And also that he had said that he could — he would not develop more products for Hazen Paper Company.

Q. (By Mr. Randall) All right.

He told you that on the plane trip? A. Yes, sir.

Q. What was your response to him? A. I was pretty shocked.

* * *

[130] A. Well, when the law went into effect, the company was required by the middle of May to train all the personnel within the plant on all aspects required by the Right-to-Know, which was all the hazards connected with working both with chemicals, physical and whatnot.

Mr. Biggins approached me sometime in late January or February with a proposal to train our personnel and gave me some figures, and I thought well, at that point we had about a hundred and twenty-five employees, I thought that perhaps since it was going to be an ongoing requirement of the company, that we should set up our own training program, which we did.

Q. I see. But who was it that visited you, and you said February of 1986, Walter Biggins or Timothy Biggins? A. Walter Biggins.

Q. And was it Walter Biggins who made the presentation as to what W.F. Biggins, Inc. could do for your company?

A. To the best of my knowledge, yes.

Q. Now, tell me a little bit about the nature of the business of the Sullivan Paper Company.

[131] What kind of work does the Sullivan Paper Company do?

A. We are classified as a paper converter. They have eight roller gravure presses, about thirty-seven embossing machines. Three guillotines. Three sheeters. Half a dozen slitters. A collator.

And the type of work that we did was add value primarily to paper, which means that we printed designs on paper for box gift wrap, notebook liners, picture frames, book covers, almost every market that's available for that type of substrate.

Q. Several of those lines sound very familiar.

Are they similar to what the Hazen Company does?

A. Hazen Paper Company as well as Holyoke Card and Hampden were what we considered good competitors in our area. We competed more in commodity items than some of the small areas that we got involved in.

Q. Now, you told us about Walter Biggins contacting you in May of 19 — I'm sorry, February of 1986.

I want you to think back now to 1984, [132] whether in that year you were contacted with respect to a company named Proclamation, Inc.? A. Yes. At that particular point in time, I had lunch with Walter and his son Timothy at the Windmill.

They came up with a proposal whereby we could dispose of our waste solvents and waste inks by a vacuum distillation system, which he and his son had in a portable unit on the truck.

Q. Now, if you can remember, who at the lunch described for you what the Proclamation Company would do for solvent?

A. Pretty much Walter. Tim contributed some. He was kind of young and fresh out of college.

Q. Did you utilize the services of Proclamation? A. Not immediately, but after thinking about it for a while, I thought that we should have a secondary source of disposal, and I did contact Proclamation, or whatever the name of the company was, and Tim came with the portable unit and distilled three 50-gallon drums with crystal clear solvents; excellent quality as far as recovery was concerned.

And we were then billed for this at \$150 ...

* * *

[145] REDIRECT EXAMINATION BY MR. MCGINLEY

Q. Mr. Cahillane mentioned a trade meeting, Mr. Sullivan. Do you remember in the Spring of 1986 coming back from Boston? A. Yes, I do.

Q. And during that trip back, was there discussion about Walter Biggins being a speaker at the trade meeting?

MR. CAHILLANE: Objection, your Honor. I don't believe I covered that on cross examination.

MR. MCGINLEY: There was talk about trade meetings.

THE COURT: He talked about trade meetings, I think. But I don't remember any conversations.

MR. MCGINLEY: It's very short, your Honor.

THE COURT: All right.

MR. CAHILLANE: Whether it's short wouldn't matter. It wasn't the subject matter of redirect.

THE COURT: I'll allow him.

THE WITNESS: We were returning [146] from a meeting of the DEQE, which is the environmental agency for the State of Massachusetts, and the occupants of our van were local people in this area that were involved in the environmental affairs.

And we were — we all belonged to a trade association, which was looking for a speaker for the third week in May. And Malcolm Gezner, who was an employee of Hazen Paper Company, I suggested that he check with Tom Hazen to see if Walter Biggins, one of his employees, could give a talk on the Right-to-Know law, since he was obviously, had a tremendous amount of expertise since he was training people out in the field.

Q. And did you subsequently hear from Tom Hazen?

A. In about two or three weeks, yes, I did.

Q. And was there a telephone call from him? A. Yes, there was. Unusual telephone call.

Q. Unusual in what sense? A. Well, to begin with, Tom talked for about an hour and forty minutes.

MR. CAHILLANE: Objection.

THE COURT: He may answer.

THE WITNESS: Tom Hazen talked for [147] about an hour and forty minutes; the principal subject of the conversation was Walter Biggins and what relationship I had had with him at Sullivan Paper Company in the two years previous, in that particular year.

Q. (By Mr. McGinley) Was there any further discussion about appearing at the meeting for the Right-to-Know speech?

A. This conversation was after the fact. That is the telephone conversation.

MR. MCGINLEY: Thank you, your Honor.

THE COURT: All right. Cross examination?

MR. CAHILLANE: No questions, your Honor.

THE COURT: Step down. You're excused.

Defendants may call their next witness.

MR. MCGINLEY: Mr. Scott, please.

* * *

[156] THE WITNESS: August of '84, the 24th, a Tuesday.

Q. (By Mr. McGinley) You had lunch with Walter Biggins? A. Yes.

Q. Was that to discuss Proclamation? A. That I believe was the date that we did the experiment out behind the factory with the portable unit.

Q. Now, did you have an employee working at your company named Tim McDonald? A. Yes, Tim was a research chemist who worked with us for ten years.

Q. Tim McDonald, where is he now, if you know?

A. He's the technical director at Hazen right now.

Q. Do you know the circumstances under which he left the Hampden Paper Company? A. Well, Tim is an extremely good research chemist. A good scientist.

And unfortunately, he's ten years younger than I am, and he had no upward mobility within our corporation. He was with us for ten years and did a good job for us.

[160] CROSS EXAMINATION BY MR. EGAN

Q. Mr. Scott, you said that you did not have a covenant not to compete with Hampden Paper Company; is that correct?

A. That's correct.

Q. And when did you go to work for Hampden Paper Company, sir? A. October 1962.

Q. Any period of time since October of 1962, have you had a contract with them? A. No.

Q. Is your job described anywhere? A. Yes. I guess it would be.

Q. In a job description? A. Yes.

Q. Was that job description given to you? A. No. It's something I would write myself.

Q. Something you wrote yourself? A. Yes. I don't really have a technical superior within the organization.

Q. Okay.

Now, Mr. McDonald, how old was he when he left your employment, approximately? A. Boy, I would guess thirty-five, . . .

[174] CROSS EXAMINATION BY MR. CAHILLANE

Q. There isn't any question, Mr. Fuller, that it was Timothy Biggins who was going to get up and speak at this meeting; correct? A. That's correct.

Q. And it was Timothy Biggins who came to you and talked to you about the Right-to-Know business? A. Tim made the visit in my office with the promotional material.

Q. And back in 1983 or 1984, you described a discussion with respect to Proclamation that occurred in a van coming back or going to Boston? A. Yes.

Q. And who was in that van? A. There were a lot of trips to Boston for a lot of years.

I could give you the probable occupants, but I can't be positive.

Q. Could Malcolm Gezner have been in that van?

A. Could have been.

Q. Who was Malcolm Gezner? A. Walter was the technical director in [175] Hazen, and I believe that Malcolm was Vice President perhaps of Manufacturing. I don't know his title exactly, I'm not sure.

But I knew them both equally.

Q. At Hazen Paper Company? A. At Hazen.

Q. And in this conversation which Walter is talking about Proclamation, he was doing it openly with Mr. Gezner present, wasn't he? A. I just can't recall.

MR. CAHILLANE: That's all I have.

THE COURT: All right. Anything further?

MR. MCGINLEY: Nothing further.

THE COURT: Step down.

Call your next witness.

MR. CAHILLANE: May we have a side bar, your Honor?

THE COURT: Very well.

(*Bench conference held.*)

MR. EGAN: This witness is not on the witness list.

MR. RANDALL: They never asked us. My understanding is that in their interrogatories and questions, they never asked us . . .

[214] . . . kind of bothers me because it correlates with my gut feeling that Walter's interest was slacking off, and since I have been involved in this legal maneuvering, I learned that Walter had done a lot of back treatment work at one of his previous companies. I think it was at the Brown Company, or perhaps Ludlow. Ludlow would make more sense.

So he had some background in coming up with back treatments, but never produced one for the Hazen Paper Company, at least on that product.

Q. Did Walter Biggins ever discuss the possibility of a raise while he was at the Hazen Paper Company? A. Walter Biggins talked about how underpaid he was very, very often.

Q. Do you recall any particular lunch meeting where you discussed his salary with him? A. I'm sure — and again, just because I've read the record, I'm sure there were at least two occasions where Tom and I had lunch with Walter, and he gave us this pitch again about how underpaid he was, and I think we reacted — we increased his pay.

I think it's been indicated we increased it by ten percent. That's a lot.

You look at the contracts that are signed [215] these days, and most of them are two or three percent range. Ten percent is a big increase. I know Walter didn't think so, but to us it was a big increase.

Q. Now, was that the result of both those luncheon meetings that you can recall? A. To be honest, I don't recall exactly what the increase is. And I'm not even sure that he was increased each time. But I'm relatively sure that he was.

Q. How did he rank in the company at the time; let's say in the year 1985, rank in the company when it came to a pay scale? A. Walter was the fourth highest paid employee at Hazen. Tom and Bob Hazen were paid the same amount.

Q. Do you recall how much that was? A. I don't honestly remember. The records are here. I'm sure that information is available.

The next man was a man named Malcolm Gezner, who had been with us for, I'm guessing twenty years, he was the next highest paid. The next one down was Walter Biggins. And he had been with us for eight years.

Q. How many people were in the company at ...

. . .

[217] Q. Now, you've indicated that you thought Walter Biggins' performance had changed over the passage of time.

Prior now to 1986, did your attitude towards Walter Biggins change during that passage of time? A. Well, I got very impatient with his frequent increases for increased salary. I got impatient with the length of time it took him to develop these products.

I had the gut feeling that he just wasn't as interested in Hazen as he was in 1980. I don't think that, you know, we were — Hazen is, probably a criticism of Hazen might well be that we are understaffed. We worked too hard.

I'm just thinking about myself, I'm talking about these people that were in here today that you heard. I'm talking about my cousin Tom. We normally work Saturdays. And we have been doing that for God, twenty-five years.

I don't know what I was getting at. What did you ask me?

Q. I asked you whether your attitude towards Walter Biggins had changed over the years. A. I guess my point in all this rigamarole ...

. . .

[219] ...with him at any time you took a trip with him? A. That's really kind of ludicrous, but as we mentioned this morning, I have a horrible habit. I smoke, and I've got to stop.

But I sit in the smoking section on airplanes. Walter is a nonsmoker, and chooses to sit in the nonsmoking section.

That seems pretty simple.

Q. Did there ever come a time when you stopped taking Walter Biggins on trips for any particular reason? A. I don't remember anything. Certainly to me, my gut feeling was that the interest wasn't there.

I might well have stopped, but I don't recall making a conscious decision to do that.

Q. You never said to him you're not going on any[] more trips, Walter, or anything like that? A. I don't believe I did.

Q. Now, had you ever heard about the existence of Proclamation, while you were working away at Hazen?

A. It seems to me he told me about that. And I'm not sure when it may have been. I'm not sure when. It may have been '84.

[220] And he told me, because Walter had come to talk, I believe, and said: Look, I have a company. He didn't say: I had a company. Walter said: My son is starting up a company to recycle solvents. I want to help him out.

Tom said: I'm nervous about that, make sure he doesn't call on our competitors. Walter promised Tom that this company would not call on our competitors.

Q. And did you ever learn at the Hazen Company that that company Proclamation did in fact call on your competitors?

A. I think we had confirmation of this, or pretty good inkling of that in the Spring of 1986. I'm sure we had a pretty good inkling in the Spring of 1986. I don't remember knowing, because I think we would have reacted to it, that Walter was indeed making contact with our competitors in the Holyoke-Springfield area selling a system that he helped develop at the Hazen Paper Company.

He got all the wrinkles out of it at Hazen, and there were wrinkles. We spent a lot of money and several other people worked on this still at Hazen.

We got things, wrinkles out of it and [221] then Walter proceeded to sell that knowledge to our competitors. Not for anybody's gain at Hazen, for Walter Biggins' gain.

Not only is that deceitful, it's — he took time away from the company. He was fully paid in 1985. He got what, seventy-five thousand dollars?

Not only was he fully paid that year — well, I'm wrong, though. It was '84 when all this still thing was going on. I cannot remember what he was paid then, but he was well paid.

He was taking time away from the company when all this still business on his own was taking place, and selling this information, this setup to our competitors, making life easier for them and harder for us, basically. And sticking the gold in his pocket.

And again, you got to go back to the teamwork thing. When we do something, we try to do it as a team. Walter wasn't hurting Bob Hazen, just Bob Hazen or Tom Hazen. Walter Biggins was hurting Gail Manning-Calvanese, who was in here today. He was hurting Bill Izatt that was in here today. He was hurting everybody that worked on the project by his action of selling this information, this equipment to competitors. Disgusting.

[222] Q. Now, did the Hazen Paper Company, I think you told us earlier they had to comply with the Right-to-Know regulations as well? A. That's right.

Q. And at the Hazen Paper Company, who is in charge with complying with those regulations? A. Well, it was Walter's job. That's part of the Technical Director's job; was to see that we complied with all the Government regulations.

Q. And do you know whether he did that job? A. Walter spent some monies, Hazen money, gaining the knowledge by attending various seminars and certainly during his paid time, gaining the knowledge on how to present this program to our employees, which we were obligated to present, just like every other company.

Q. Do you recall instances where Walter Biggins did make presentations to the Hazen employees on Right-to-Know?

A. I don't, to be honest. I would guess that it was done.

Q. You had to have been at some of them? A. Because we wanted to comply.

Q. You had to have been at some of them; had you not?

[223] A. That's a good point. Yes. You're right.

Q. At any rate, did you ever hear of company called W.F. Biggins, Inc. subsequently? A. I certainly heard about it. But this was very close to the end of Walter's tenure at the Hazen Paper Company.

I think this is really, if this is the straw, this is the one that broke the camel's back.

Clearly, in spite of everything we have heard, W.F. Biggins is not Tim Biggins. W.F. Biggins is Walter Biggins.

Again, he was trading on information that he picked up while he was working for Hazen and selling it to outsiders outside our organization for his own benefit, while he continued to be an employee of the Hazen Paper Company.

Q. You heard Mr. Cahillane ask Mr. Biggins on Monday whether he had ever been counseled by the Hazen Company during the course of his time there by any of these activities; do you remember that? A. I heard that; yes.

Q. Was there any time that you or Tom counseled with him on what he was doing? A. Well, maybe we needed a definition of counsel.

[224] We certainly spoke to Walter about his lack of progress in certain areas and how we needed faster results.

We certainly discussed with Walter the — well, basically the need to produce. To do his job.

Everyone in the organization was depending on our Technical Service Department, our Technical Director to get the job done. And if it's correct, proper English, he was certainly counseled to get on with the job.

Q. Now, do you recall that in May of 1986 the meeting took place with you and Tom Hazen and Walter Biggins? A. May of 1986?

Q. Yes. A. That's the meeting we held with Walter, I believe it's been established that that was a Saturday. Saturday morning.

We asked Walter to come in because we had — Tom has been given this W.F. Biggins brochure, not Timmy, Walter Biggins' brochure.

And we wanted to know what in the world was going on. It seemed clear to us that Walter was again trading on information that he learned while [225] working for the Hazen Paper Company, and trying to represent his own personal gain with our competitors.

We wanted to know what the heck was going on.

I think the result of the meeting as I remember was that Walter, this has got to stop. You can't be working for our com-

petitors and working for the Hazen Paper Company at the same time.

Q. Did Walter have any response at the meeting? A. I'm sure he did. I don't know what it was. You know, I think we were so upset we probably didn't listen very carefully, although I'm not sure.

Certainly the thought that Walter was, oh, what's the right word? You used Benedict Arnold. Certainly, what he did corresponded to what Walter did to not just Bob and Tom Hazen, but to all his fellow employees at Hazen.

It was a deceitful act and I'm amazed that he can handle that himself.

Q. Well, how did the May 24th meeting end? A. I think we told Walter that we were going to come up with a — I'm at a loss.

Q. Non-compete? A. An employment contract. I think that was [226] the suggestion made at the time.

Because we wanted this, you know, it's — and I don't know if we did the right thing or not, but our thinking at the time was that we wanted to retain Walter because we spent a lot of time training him, basically.

Sometimes you're better off when you know somebody's shortcomings than going out and hiring somebody else. You don't know his shortcomings. I'm sure that was part of it. I'm sure part of the training was part of it.

But I think that both Tom and I, we talked about this beforehand, that we wanted to retain Walter, but the only way we would retain him would be to control his outside activities. And that's basically what we were trying to do with the employment contract.

Maybe it was stupid.

Q. Well, he didn't sign this employment contract? A. No, he didn't sign it.

Q. Was there any further communication with him after that that you can recall? A. Oh, I'm sure there was. I think —

Q. Did you wash your hands of it at that . . .

[July 19, 1990, Volume IV, p 10] I ask you to read that over. A. All right.

Q. Now, does that refresh your memory as to whether or not counseling is a word that comes from the Hazen employee handbook? A. Certainly does.

Q. And that Hazen employee handbook, did you review that before that was given to employees? A. I'm sure I had a chance to look at it. I don't know what the date is. 1980.

Q. Okay.

And do you have a subsequent employee handbook?

A. I'm sure we do.

Q. Is that phrase "counseling" still in there? A. I don't have any idea.

Q. Can you tell me whether or not you had said at your deposition that you have been involved in counseling or whatever word you want to use, of employees previously who were dishonest? A. I have?

Q. Yes, sir. A. I don't recall.

Q. Has the company? [11] A. Has the company?

Q. Yes. A. I'm sure over the sixty-year history, we have at one time or another talked to people that were dishonest.

Q. Okay.

Have you also, to use your word now, I'm going to use the word, counseled employees or had the company been involved in counseling employees who were drunks? A. Certainly.

Q. And who were drug addicts? A. I'm sure that's occurred. Very seldom, fortunately, but . . .

Q. Those people were not discharged; correct? A. Incorrect.

Q. They were discharged after counseling? A. I'm sure Hazen has tried over the years —

Q. Just bear with me and answer the question. A. I'm trying to.

Q. With regards to discharge after counseling? [12] A. I'm sure some were and some were not.

Q. Okay.

But your testimony is that you were not involved in any of that? A. No. I said that was incorrect.

Q. I'm sorry.

Were you involved in some of that? A. I have been involved with some employees, yes.

Q. And how did that — what form did that counseling take?

A. I can remember, and I know in my deposition I talked about twenty-three years ago, I don't even know if that's correct, but this was a time when Hazen was quite small and Tom and Bob Hazen got involved in a lot of different subjects, including employee relations. Several more then than now.

I can remember we had one press operator that had been with us for fifteen years, and darn good operator, and he was really a nice guy. I think we regarded him not only as an employee, but we regarded him as a friend.

He had had some very tough personal problems, and he turned to the bottle for whatever [13] you turn to the bottle for. I personally tried to get him off the bottle. Tried to get him back on track and not only with a selfish motive in mind, I liked him. I thought he could recover and do good things for himself.

I can remember making trips to the worse slums that Holyoke had at the time, and visiting the guy to try to get him back in the groove. It didn't work.

Q. You spent a lot of time on that? A. I did indeed.

Q. Gave it a lot of effort? A. Yes.

Q. There were other employees that you counseled in a similar fashion? A. I'm sure I did, but not to the extent that I went with this man.

Q. In that particular instance, how long a period of time did you work with that man? A. I don't recall.

Q. Would you say it was more than six months? A. Probably, but I don't really remember.

Q. Would it be fair to say that you worked with him on a daily basis, checked with him in the [14] plant? A. It's possible. But when he was with us, we occupied a multi-story build-

ing and he worked on the top floor. I worked on the bottom floor, or the next to the bottom floor.

So I didn't see him as often, and perhaps I should have.

Q. So would it be fair to say then weekly? A. Oh, certainly.

Q. And are there other people that you can recall that you may have not — and I don't want names, that you may not have worked with, but have been counseled or assisted by Hazen before they have been let go? A. Oh, I'm sure.

Q. Okay.

Can you give me some instances of employees' dishonesty where you've assisted and counseled before they were let go?

A. I don't think so.

Q. But you did say in your deposition that you do work with people who have been dishonest? A. Yeah, I think that was a general idea that it was the company's policy, to work with people that are not doing what we consider the proper [15] — exhibiting the proper behavior.

MR. EGAN: May I approach?

THE COURT: Yes.

Q. (By Mr. Egan) I'm going to show you your deposition. See if that — this is the question, just read to yourself and see if it helps you. Page 85, Volume 2. Just to yourself. A. Just that page?

Q. You're welcome to turn to the page before, the page after, it if will help you, sir. A. What is the question?

Q. The question is does that refresh your memory as to whether or not the company counseled employees who were dishonest? A. I'm sure we have over the years.

Q. Is it a fair statement to say, Mr. Hazen, that you have a great deal of personal animosity towards Mr. Biggins?

A. Animosity?

Q. Yes, sir. A. Certainly that's true now, once I've found out about his dishonesty at the Hazen Paper Company. No question.

Q. Was it true back in 1984? A. I would say not.

[16] Q. Was it true back in 1985? A. I don't think so.

Q. Was it true back in 1986? A. Certainly after we learned of these outside activities, most definitely.

Q. But you say that your animosity towards him did not develop until let's say April or May of 1986; is that a fair statement? A. That's a fair statement.

Q. Did you call him names when he was in your employment? A. It's possible. I don't believe.

Q. Did you call him names specifically that reflected upon his religious faith? A. I don't remember.

Q. You don't remember?

Did you call him names that reflected upon his ethnic background? A. I don't remember.

Q. Page 118, Volume 2 of your deposition.

I ask you, sir, to read that page and the next page to yourself, please. A. All right.

Q. Does that refresh your memory as to the names you called Mr. Biggins, reflecting on his [17] religious faith and ethnic background when he was in your employ? A. I don't think that's something to be taken very seriously.

Q. Tell the jury what it is you don't think is to be taken very seriously. A. You read it to them.

Q. They are your words, sir.

Tell the jury what it is. A. I can't do it without getting that.

Q. I'll give it to you.

If you read this to refresh your memory, for that phrase, sir. A. All right.

The question is: Did you ever refer to Mr. Biggins as a god-dam Irish Catholic bastard.

And my answer is: "Probably".

Now, in thinking more about this —

Q. That's all I have. A. But you don't want me to tell you the whole truth?

Q. I think you have.

MR. EGAN: No further questions, your Honor.

THE COURT: All right. Your lawyer . . .

. . .

[42] . . . Ottopol 2035 to the Hazen Paper Company? A. Correct. A short while, year or maybe two years after I started with my company, I maintained contact with Hazen Paper and at that time, I suggested that since with the Zinpol 1519 there seemed to be problems, that our Ottopol 2035 might be an improved alternative to the Zinpol 1519.

Q. Did Hazen Paper Company ultimately accept your recommendation? A. Hazen Paper Company evaluated the product and found that they could formulate it into a suitable coating.

And within a relatively short period of time, we were selling substantial amounts of that resin to Hazen Paper Company.

Q. And is that the base product that up until recently, that has been the base of the product, of Hazen Paper's water-based acrylic; is that correct? A. Yes, correct.

Q. Now, there are — in your experience, are there a number of people that have water-based acrylics? A. There are a large number of manufacturers, starting from Rohmhaas, B.F. Goodrich, . . .

. . .

[50] . . . Company now? A. My official position is Treasurer. But I have a lot of responsibilities above and beyond that. It's still a small company.

In addition to being financial officer, I have sales responsibility. I handle the New York market, basically, which is largely cosmetic companies. And photomount companies. And I also handle the binding materials business for the company.

In addition to that, I'm Chairman of the Executive Committee, which is the group that gets together fairly regularly and discusses capital projects and major policy issues for the company.

I have some responsibilities in the human resources area. That is, personnel relations.

Bob and I both supervise, have overall responsibility for supervision of manufacturing, with the Vice President of Manufacturing reporting to both of us.

I supervise directly the Technical Service. That department, that is I'm the company officer to whom the Technical Service Director reports, or Technical Director reports.

Q. How many products does the Hazen Paper . . .

. . .

[67] THE COURT: All right.

MR. MCGINLEY: May I ask about it?

Q. (By Mr. McGinley) Did you utilize it as a guide?

A. Certainly did.

Q. And can you tell us how?

THE COURT: Instead of referring to the magazine, do you feel you paid based upon your knowledge of the trade, the industry, whatever the manual may help you to achieve, that Mr. Biggins was fairly compensated as a person in his caliber, his status in the company?

THE WITNESS: He was certainly at a minimum fairly compensated.

MR. MCGINLEY: Thank you.

THE WITNESS: It is not really a magazine.

MR. EGAN: Your Honor, please. No questions.

THE WITNESS: Oh, okay.

Q. (By Mr. McGinley) Now, was there a subsequent meeting with Mr. Biggins regarding his salary request? A. Subsequent to?

Q. In which you discussed among other [68] things, a stock appreciation rights plan? A. I may have discussed that briefly with him in that January '85 meeting.

Q. January '85 meeting? A. '85 meeting. Yes. I think I told him that the company was considering a plan called stock appreciation rights, or phantom stock options.

It's a quite complicated plan. It really is a deferred compensation, or type of pension.

We would have offered it to a limited number of key executive people. And it was in very informal stages.

I think I mentioned that we were considering that.

Q. What would have to be done to make that plan viable at the Hazen Company? A. Well, it would certainly have to have the agreement of the principals, myself and Bob Hazen.

We were at the time consulting with our legal counsel on the format of the plan.

We were also consulting with our accountants. I had recommended diverse recommendations, our accountant was pretty much [69] against it. And Mr. Robert Hazen was against it.

But we were still considering it. And as late as 1986, we were looking at drafts for this, typical drafts.

It's not a simple document. It is like a pension plan.

Q. Was it ever put into effect? A. No, it was not put into effect.

Q. Even to this day? A. That's correct.

Q. Now, were you ever aware of Mr. Biggins' involvement with a company called Proclamation? A. I never knew the name or certainly not while I was — not while he was employed.

I heard the name since. Proclamation.

Q. Did you have a discussion about a distillation process?

A. With Mr. Biggins?

Q. Yes. This would have been 1983 or '84. A. In '83 or in '84, I don't know whether Mr. Biggins told me about it or one of the other employees told me that Mr. Biggins was somehow involved in a distillation process involving the distillation of waste coatings and inks.

On that occasion, Mr. Biggins and I — [70] I was concerned about what I heard. And I did schedule a meeting with Mr. Biggins at Kelly's Lobster House.

And I talked to him about my concerns about this — the information I was getting about this business.

Mr. Biggins assured me that he was not personally involved, except as an advisor to his son Tim. That they were disposing of waste materials from small auto body paint shops and maybe even garages.

I specifically asked him whether he was going to be involved with competitors of ours, and I told him that would be totally inappropriate, even if it was only his son's activity.

He indicated that that was not what his intention was. And he would not call on the competitors of ours.

I told him — I warned him that that — I thought he was trading on our information. I told him I was uncomfortable because it looked as if he were using expertise he developed while at Hazen Paper Company as an employee for his own business.

But I knew Tim Biggins. I was sympathetic with Tim Biggins, I liked him, and I took [71] Mr. Biggins' word that it really was not going to be a major conflict with our activities.

Q. Did the Hazen Paper Company itself utilize a distillation process in the early '80's? A. That's correct.

We put in — it was a means of disposing of the waste ink and coating.

And rather than sending it to an outside disposal site, which is somewhat dangerous and expensive, the plan was to do it in-house, and we developed a distillation process which we used for a while to deal with the disposal problem.

Q. Who was responsible for this process at the Hazen Paper Company? A. Walter Biggins.

Q. In the development of that process, the distillation process at the Hazen Paper Company, was it ever necessary for Mr. Biggins to go to a company known as James River Graphics? A. I don't know whether it was necessary to or not.

It was — Mr. Biggins and a man named Malcolm Gezner, who is deceased and was the Vice President of Manufacturing, had responsibilities as what we called compliance officers.

* * *

[73] . . . you pay me so much I'll show you how they do it. I know how to do it. We will show you how to dispose of it. We do it that way.

— In other words, that wasn't the case. We didn't pay a third party nor did we pay James River Graphics. But really, the circumstances were totally different.

It would have been more comparable had one of them held us up for money. That would have been what Walter did.

Q. Did you at some time become aware of the existence of a company called W.F. Biggins, Inc.? A. I became aware of the existence of W.F. Biggins, Inc. when Mr. MacMeekin, who testified here yesterday that he came in to see me in April of '86; came in and showed me this brochure that's been shown around here.

Q. I show you Defendant's Exhibit F in evidence and ask you if that is that brochure? A. That's it.

Q. Now, when Mr. Biggins showed — Mr. MacMeekin showed you that brochure, what was your reaction? A. I was dumbfounded. I was very upset. I felt I had been deceived by Walter, and I had been [74] betrayed by him.

Q. Did you eventually show that to Mr. Biggins? A. I showed him the brochure. This would have been near the very end of April. I showed it to him — I think I first showed it to Bob Hazen and Malcolm Gezner.

And within a day or two, I asked Walter to come into my office, and I showed him the brochure and I asked him what the meaning of it was.

Q. What did he say? A. Well, he said this is the business I told you in passing about my son being involved in.

I said this is not your son's business. Or this is W.F. Biggins, Associates. How can this be your son's business? This is your business.

I said this is totally unsatisfactory. I'm very unhappy about this. We are going to investigate it. This is not the end of it.

Q. Now, had Mr. Biggins previously mentioned right-to-work business on behalf of his son to you?

MR. EGAN: I believe it's Right-to-Know.

MR. MCGINLEY: Thank you.

[75] THE WITNESS: Yeah. Probably early '86.

In the course of a discussion about a number of things, Walter told me offhandedly that, by the way, my son has gone into the consulting business.

I asked him: Well, what's it all about?

Of course, Tim had been an employee of ours or I knew Tim and had a certain interest.

Then he told me he was in the Right-to-Know area. And I said: Well, are you involved in this, Walter?

And he said: Oh, no, it's my son's business. I advise him occasionally. But it's my son's business.

That's about the extent of the conversation.

Q. Now, did Mr. Biggins as a part of his job responsibilities at Hazen was in the Right-to-Know area? A. Absolutely. That was his — it was his compliance effort.

And he became very interested in it. He gave it more attention than usual almost.

Q. Did you send him to do any studying on [76] Hazen time?

A. Actually, the issue of the Right-to-Know law and compliance with it came to have been brought to our attention by our human resources employee relations legal consultant a year, eighteen months earlier. They had sent us a whole bunch of material, which I passed on to Walter.

I subsequently, I was concerned. It looked like an awesome amount of material. A thick to-do. It was all very complicated law.

I subsequently wrote our legal advisor and asked him to come in and spend some time with Walter going over the law, and how we might go about complying with it.

Walter, I also think Walter attended an Associated Industries meeting on the subject. He certainly did a lot of work and study while at work at Hazen Paper Company on this project, on the problem.

Q. Was there a meeting in Massachusetts on the clean air requirements sometime after that, after which you telephoned Roger Sullivan? A. Well, I had shown this brochure to Malcolm Gezner and to Bob. There was a meeting of Associated Industries air compliance officers in [77] Boston early in May, and — Malcolm went to that meeting.

He returned from the meeting and reported that people there had asked him whether Mr. Biggins —

MR. EGAN: Objection.

THE COURT: As a result of what he told you, what happened?

THE WITNESS: All right.

Q. (By Mr. McGinley) Don't give us the conversation. Take it to the end.

After having received this information, what then happened? A. Well, one result of what happened was that I called Mr. Sullivan and asked him whether he had been approached by Mr. Biggins about the Right-to-Know, and about his distillation process that Mr. Biggins is now — what I knew to be Mr. Biggins' process.

Mr. Sullivan reported to me he had been approached personally by both —

MR. EGAN: Objection.

THE COURT: He's already testified.

MR. EGAN: That was my objection. It's already been testified to.

[78] THE COURT: You may answer.

Q. (By Mr. McGinley) What did Roger Sullivan tell you?

A. He told me that Walter had personally contracted him, arranged a luncheon meeting with he and his son. And that he conducted trials at Sullivan's with the distillation unit, and he had also been approached on the Right-to-Know by Walter Biggins, not by Tim Biggins.

Q. Now, was this the first occasion you had that Mr. Biggins was dealing with competitors? A. That's the first confirmation of that for sure.

Q. Did you thereafter then meet again with Mr. Biggins and tell him about the Roger Sullivan telephone call? A. Yes, I did.

Q. Can you tell us about that conversation you had with Mr. Biggins? A. Well, I told Mr. Biggins in a brief meeting in my office that I had talked to Roger Sullivan and what he told me.

Mr. Biggins did not deny that he approached Roger Sullivan, and I said this just is further indication of the problem we have [79] previously talked about. It will not end. We are investigating it. We don't know exactly what we are going to do.

I don't know whether at this time or subsequently we scheduled a meeting for the 24th that's been described, the 24th of May between Walter Biggins, myself and Robert Hazen.

We scheduled it for a Saturday to be held in our conference room, so that there would not be any particular attention called to it. And that is what happened there.

Q. Then let's go to the May 24th meeting.

What day of the week was that? A. That was a Saturday.

Q. And what happened at the meeting? A. Well, we again, we outlined our concerns. This was the first time Bob had met on the subject with Walter.

Again, we outlined why we thought that this — these activities were so outrageous.

Q. Did you tell him you would present any documentation?

A. Yes, I'm trying to think.

We talked about the fact that we were in the process of drawing up a confidentiality [80] agreement, which we expected him to review and sign if our employment arrangement was to continue.

Q. And what if anything did Mr. Biggins say at the meeting on the 24th? A. He — I think the surprising thing is that he didn't indicate strong desires to continue his job.

I really, throughout the whole thing I did not get the feeling that — it wasn't as if he was saying gee, I really value my job here, I can see that the problems that my activities have caused the company, he wasn't saying that.

He seemed to still have difficulty understanding why it would be objectionable for the company for him to carry on these activities. The activities are terribly objectionable.

Q. Did there come a time then when you presented the documentation to give to Mr. Biggins? A. Yes.

Q. And — A. The documentation was — the document was prepared in cooperation with our legal advisor, and also we reviewed other confidentiality agreements of other companies. I think we looked at American Pad's agreement. We looked at a Dennison [81] National agreement. We talked to people at James River about the contents of these agreements.

And eventually on the 30th of May, which was a Friday, both Bob and I signed the cover letter, outlining the terms of how it would be accomplished and some of the details, and the confidentiality agreement was attached to that. And it was definitely given to Walter Biggins on May 30th, the afternoon, which was a Friday afternoon.

I was being very cautious to dot my i's and cross my t's. I certainly did not defer doing that until the following Tuesday.

Q. Is this a copy of the agreement which is in evidence, the May 30th memorandum? A. Certainly looks like it, yes.

Q. When you gave that to Mr. Biggins, both the memorandum and the agreement, did he say anything? A. He clearly wasn't happy about it. I believe his comment was that was I going to pay the cost of his attorney to review this.

I felt that really was adding insult to injury. And it was an indication of his whole attitude.

And frankly, I walked out. He described . . .

. . . .

[84] . . . who he's not unfamiliar with —

MR. EGAN: Objection.

THE COURT: That will go out.

MR. EGAN: May I just have a cautionary instruction on that?

THE COURT: Well, the jury has been asked to — I will instruct the jury to disregard the comment.

MR. EGAN: Thank you, your Honor.

THE WITNESS: I just would have thought that if he was seriously interested in continuing his employment he would have gotten back to us earlier the following week with some kind of response.

Q. (By Mr. McGinley) Did you remind him of the deadline that you had given him subsequently? A. I didn't hear from him throughout the whole week.

On the Friday, which would have been a week after I gave him the document, I reminded him that we only had until the following Monday to get this resolved, and he said something, that he would do something about it.

Q. And as it turned out, the following Monday you were in New York and unavailable to meet? [85] A. Yes.

Q. So when did you meet? A. I met him the following day, which was the Tuesday, the 10th.

Q. And were you able to come to any agreement over that document at that time? A. No.

Q. Did you then do anything else by suggestion of any kind of an agreement at that time? A. Well, he certainly had indicated that he wasn't very interested in signing the document.

My sense was that he really was interested in going into the consulting business. He named it after himself.

I suggested that we try and work out a separation agreement, which would cover things like his pension rights; perhaps a pay plan for a temporary basis to ease him through, and other benefits, and would have dealt with things like the unemployment insurance, that we would work out such a separation agreement.

And that we also would work out some kind of a deal where he could do this kind of consulting for us.

We could have used him on a retainer [86] basis. Would have gotten him out of a highly confidential area for us; at the same time it seemed it would be in the interest of both parties to work out an amicable arrangement.

I thought Mr. Biggins was interested in this, but I later found out he was not.

Q. So when did you see him for the last time at that point?

A. I think we met a couple of times during that week.

I thought as late as Thursday of that week that he was really interested in a separation agreement, which would protect both parties. And it would have included some understanding from him about the confidentiality of what he had learned at Hazen. We didn't want him going after, using our customer list and our contacts, and we wanted in return for a monetary benefit, we wanted a confidentiality agreement.

And we would have given him a consultant agreement. And I thought he bought the idea.

There still seemed to be some reservation about any kind of confidentiality agreement. He wasn't talking much. He wasn't saying very much to me, which troubled me. . . .

. . . .

[90] . . . agreement we were talking about.

Q. Use either word. Which one was he talking about?

A. He had indicated he wanted a — I don't know.

Q. What's the word that makes you feel better, I mean, I'm not hung up on the word.

It's money, right? A. Yeah. He wanted additional dollars in order to sign this.

Q. You in substance said you sign the agreement the way it is, there will be nothing about compensation in this agreement; correct? A. I certainly was not going to give him a raise.

Q. Is that in substance what you told him, sir? A. That's right.

Q. Now, you then went and signed an agreement with Timothy McDonald for his position; is that correct?

A. That's correct.

Q. And I ask you, sir, this is a copy of that agreement?

A. Uh-huh.

[91] Q. Is it, sir? A. Yes. This is Mr. McDonald's agreement, yes, it is.

Q. Is that your signature on it? A. Yes.

MR. EGAN: I would offer this, if I may, your Honor.

THE COURT: All right. Plaintiff's Exhibit 25.

(Plaintiff's Exhibit 25 *marked in evidence.*)

Q. (By Mr. Egan) I will give it to you so you can refer to it.

A. Good.

Q. Fair to say that was signed sometime in the early Fall, I believe, September of 1986? A. September 15th.

Q. Sir? A. September 15th.

Q. Thank you.

And Mr. McDonald's age, approximately? A. About forty-five, forty.

Q. At the time about forty or forty-five? A. Somewhere in there. I don't know precisely.

[92] Q. And did this contain a covenant not to compete?

A. I believe it does.

Q. And can you tell — can you tell me, sir, whether or not that's the same covenant not to compete that you offered to Mr. Hazen in his agreement?

MR. MCGINLEY: Mr. Biggins.

Q. (By Mr. Egan) I'm sorry, Mr. Biggins. A. Very similar except for the term.

Q. As a matter of fact, it's eighteen months less, isn't it?

A. Correct.

Q. Now, sir, did you offer to put in Mr. McDonald's contract his compensation? A. In his employment contract?

Q. Mr. McDonald had an employment contract. Exhibit 25, the one you have in front of you.

Is the compensation in that agreement, Exhibit 25?

A. The actual compensation, I don't believe is in the agreement.

Q. Sir, I reference you to Page 2, the caption Compensation and Benefits. [93] A. Yeah, there is a separate appendix that has the compensation.

Q. The appendix was not produced and is not offered in evidence; correct? A. Apparently not.

Q. It was attached to that? A. Absolutely. Yes.

Q. Thank you, sir.

Now, were you the plant administrator at Hazen Paper Company for the pension retirement plan? A. Yes, that's correct.

Q. And can you just describe how long you — or tell us how long you performed that function? A. Well, I probably have been doing it for quite a while. Long time.

Q. You were doing it as long as Mr. Biggins was employed there? A. That's right.

Q. I'm going to show you a document and ask you, sir, if you are able to identify that? A. Yeah. This is a summary plan description.

Q. Summary plan description? A. It describes the benefits.

Q. It means what, to your understanding? [94] A. Well, it's a relatively brief summary of the benefits and character — characteristics of the plan.

Q. Okay.

And by relatively brief, in this case it's thirty-two pages?

A. Correct.

Q. But — A. Very complicated matter.

Q. As far as pension documents go, that's relatively brief?

A. You notice it is presented by Pension Associates, who frankly I rely very heavily on for these very technical areas.

Q. Pension Associates is your consultant in this pension area? A. That's right.

Q. You know that when Walter Biggins left the company, when he was terminated, did he forfeit some of his pension money? A. I know now that, yeah.

Q. And approximately sixty thousand dollars?

A. I'm not aware of the number.

Q. You don't know that? A. I really don't know the number.

[95] Q. These documents, they come to you at the company?

A. Yes.

Q. Okay.

Those documents are called pension accounts? A. For individual employees.

Q. Goes by individual employees? A. They do. Yes.

Q. That pension account document that comes to you and came to you during times pertinent to this lawsuit shows not only the individual's name, but the value of their account, and the percentage of their cash that is vested; fair statement?

A. Yeah. There are about a hundred of them.

Q. Okay.

And you know that — your obligation as the — or you are the only one that has the obligation at Hazen Paper; that's my understanding? A. I'm basically the — you have to have an officer at the company sign the documents, and I do it.

I rely heavily on Pension Associates for the details.

Q. Your understanding is that an individual [96] who is employed for ten years at Hazen Paper Company is fully vested, or was fully vested back in '86? A. Yeah. The vesting schedule changes with considerable regularity as the tax law changes.

I frankly might not even have been aware at that time.

Q. Back in '86 you were aware that the pension was fully vested after that time? A. I doubt that I was conscious of it. I rely on them.

Q. How long did Walter Biggins work at Hazen Paper Company? A. He worked a little over nine years.

Q. Okay.

And are you aware of anything in the plan document that provided in 1986 that if an employee worked over five years for Hazen Paper Company, he got an additional year credit towards his vesting? A. No.

Q. I would ask you to turn to Page 31 of Plaintiff's Exhibit 26.

THE COURT: You haven't offered it yet.

MR. EGAN: I'm sorry. May I offer [97] that document, your Honor?

THE COURT: All right.

MR. MCGINLEY: No objection.

THE COURT: Exhibit 26.

MR. EGAN: Thank you.

(Plaintiff's Exhibit 26 *marked in evidence.*)

Q. (By Mr. Egan) Directing your attention to what is now Plaintiff's Exhibit 26, and asking you if you will read to the members of the jury the paragraph that I just pointed out to you. A. "If the aggregate of years and months of service exceeds five, then an additional year will be added in determining your vested percentage."

I confess I don't know what it means, but perhaps you do.

Q. You know Mr. Biggins worked more than five years?

A. Yes.

Q. You know what adding five to one means; correct? It means six; right? A. Yes.

Q. As a matter of fact, when he left the company, his pension benefits were forfeited because he only had nine years and several months; is that [98] correct? A. That's my understanding.

Q. You would agree with me that if you added one, he would have in excess of ten years to that; correct? A. I don't understand this, to be honest with you.

Q. You would agree with me that if you added one to nine — A. If you add one to nine, you get ten.

Q. That's right.

Now, sir, I'm going to show you Plaintiff's Exhibit 11 and ask you if you can identify that. A. That's the famous handbook that's been —

Q. Incorporated in that is the definition of what vacation pay is at Hazen Paper Company? A. Yes.

Q. Would you explain to the Court and jury what you understand vacation pay to be at Hazen Paper Company?

A. My understanding is that vacation pay is time off — at this time, was time off without loss of pay.

In other words, if you were at the . . .

* * *

[102] THE COURT: Go ahead.

CONTINUED CROSS EXAMINATION BY MR. EGAN

Q. I'm going to ask you, Mr. Hazen, to take a look at Plaintiff's Exhibit 18 in this case.

That's a form sent from the Hazen Paper Company to the Division of Employment Security; is that correct?

A. Correct.

Q. Incidentally, as the Treasurer of Hazen Paper Company, you're familiar with the Division of Employment Security, Commonwealth of Massachusetts? A. Sure.

Q. You know that regulates benefits payable to people who are at work; correct? A. Correct.

Q. You've had in the course of your years at Hazen Paper Company routine inquiries concerning the circumstances and wages of people that you've employed? A. Yes.

Q. While I'm asking you that, you are also aware that age discrimination is illegal, aren't you? [103] A. Absolutely.

Q. And you were in 1986? A. Certainly.

Q. Now, with regard to reasons for separation on Plaintiff's Exhibit 18, you see that there are several boxes the Commonwealth allows an employer to check? A. Yes.

Q. And would you read for the jury what those boxes are?

A. Separation reason: Lack of work, voluntary quit, discharge, labor dispute, other.

Q. Now, this was signed by a Mrs. Rossmeisl on behalf of the company; isn't that correct? A. Yes.

Q. And Mrs. Rossmeisl is the comptroller of the company; is that correct? A. That's right.

Q. She worked under your supervision; is that correct?

A. Yes.

Q. And she came to you, did she not, to ask you what box she should check for Walter Biggins? A. Yes, she did.

Q. And as she testified, you were the one . . .

. . .

[105] A. That's correct.

Q. And did she keep records of accumulated vacation time for the executives? A. I would guess she — accumulated?

Q. Accumulated. A. I don't know. Accumulated?

Q. Accumulated. A. Do you mean more than one year?

Q. I mean carrying over from one year to another, sir.

A. Not that I know of.

Q. Now, sir, you offered — you testified, I believe you testified, maybe it was your cousin, about Mr. Biggins' job as a consultant with the Hazen Paper Company, sometime in the end of May of 1986? A. It was not a job, it was — it would be a consulting engagement.

Q. Consulting contract? A. Uh-huh.

Q. Okay.

And that consultant's contract, do you have such arrangements with other consultants, or did you in 1986? A. Do we have contracts with other consultants?

[106] Q. Consulting arrangements. A. Sure.

Q. And one of them is MacMeekin, the gentleman who — Mr. MacMeekin, the gentleman who testified on insurance?

A. Yes, Mr. MacMeekin.

Q. One of them is Mr. Culverson, environmental consultant? A. He wouldn't be on a retainer.

Q. He was just on an hourly basis? A. He worked on projects.

Q. Who were some of the other people that you had on retainer as consultants besides Mr. MacMeekin — did I get it right? A. That's correct.

Q. Who were some of the other people in 1986? A. Well, we had our — Sullivan and Hayes was on a small retainer.

Q. Your attorneys? A. Yes, for a yearly retainer.

Q. Who else? A. I can't think of anybody else offhand.

Q. Those individuals that you had as consultants at that time, they did not accrue any [107] benefits that an employee would accrue; isn't that correct, sir? A. That's correct.

Q. They did not accrue any time in pension? A. No, they would not get the normal employee benefits.

Q. Not accrue any health insurance benefits? A. No.

Q. Any vacation? A. That's correct.

Q. Disability insurance? A. I'm sure they charge an hourly basis, and they are a separate operation.

Q. And the arrangements that you proposed to Mr. Biggins or suggested to Mr. Biggins with regard to his consulting, did you clear that with your cousin Mr. Robert Hazen? A. I'm not sure whether I did or not. I mean, we are trying to negotiate an amicable separation.

Q. Incidentally, you own seventy percent of Hazen Paper? A. Correct.

Q. I believe you testified before that you try and run it with a partnership with your cousin, [108] but if push comes to shove, you own seventy percent? A. That's correct.

Q. Now, sir, you're not sure whether or not you had Robert Hazen's assent to a consulting agreement? A. This was going on on an hour-by-hour basis, and it was at this stage —

Q. Bear with me.

The question is are you sure? A. No, I'm not sure.

Q. Now, this proposal that you suggested to Mr. Biggins or offered to Mr. Biggins, whatever word you feel is appropriate, that would have required him to sign an agreement just like this employee confidentiality and patent agreement that is in as an exhibit in this case, Exhibit 10-A? A. It would have to have been a modified agreement.

We clearly understood that that would have to be modified if it —

Q. It was going to cover the same substantial — A. It was negotiable. That was negotiable. That was what we were trying to talk about.

* * *

[116] (Plaintiff's Exhibit 28 *marked in evidence.*)

Q. (By Mr. Egan) Sir, there has been some testimony that you've given about conversations that you had with Mr. Biggins concerning either stock or stock rights.

You gave some testimony about that, sir? A. I gave testimony about stock appreciation rights.

Q. And is it fair to say that you recall that at least one occasion upon which you discussed what you say are stock appreciation rights, or a stock appreciation plan with Mr. Biggins?

A. I, yes, I mentioned it to him.

Q. Is it fair also to say that on that one occasion, you recall him requesting a salary of six figures? A. It could have been the same occasion.

Q. Could there have been two occasions upon which you talked about it? A. Six figures?

Q. No, sir.

About the stock rights or whatever it is that — what do you call them, phantom rights? A. Phantom stock rights. Appreciation. [117] It's a complicated proposition.

Q. I'm sure it is.

Whatever the word is that you want to use, on two occasions? A. We probably talked about it on two occasions.

Q. On more than two occasions? A. I don't know.

Q. And on at least one occasion, you do recall a request by Mr. Biggins, saying that he felt he was entitled to a salary, to use your words, in the six figures? A. Uh-huh.

Q. And you, as I understand it, talked to your cousin about the stock, the phantom stock rights, and he was negative about that; fair statement? A. Yes.

Q. And at some time in '86, you laid that plan aside? A. I guess in '86 we had drafts of it, even — no, I don't know when the last drafts were looked at. Could have been '86, '87.

Q. When was it in '86 that you laid the plan aside?

* * *

... [120] Q. And when was it that you first saw, or first got the W.F. Biggins brochure? A. Late April.

Q. All right.

Now, what did you do to make sure that Timothy, independent of telling his father, what did you do to make sure that Timothy Biggins was not going to be on the program?

A. Well, Mr. Biggins had —

Q. Just bear with me.

What did you do? A. What did I do, I called Mr. Fuller. And I told him it was an embarrassment to our company to put the program on.

Q. Mr. Fuller is the gentleman who testified here yesterday? A. That's right. Yes.

Q. Now, did you say sometime in your deposition that it would be untruthful and dishonest — excuse me, let me withdraw that — it would be borderline unethical if Mr. Biggins went to work for one of your competitors after he left your company; do you recall saying that? A. I think I did.

Q. Would you tell the Court and jury from ...

* * *

[123] REDIRECT EXAMINATION BY MR. MCGINLEY

Q. Mr. Hazen, you were shown a few moments ago by Mr. Egan, this is I think Plaintiff's Exhibit 27. It's Pier 4, Pier 5 that is talked about; do you recall that? A. Yes.

Q. Anything in there that says "Biggins acrylic"? A. No, it says Biggins Pier 4. Pier 5.

Q. Exhibit 28, which Mr. Egan just gave you a few moments ago, the EPA regulations and progress on water-based coating, is there anything in that that says "Biggins acrylic"? A. No.

Q. Now, with respect to the summary plan description for the retirement program that you were shown this morning

before lunch, you indicated that you didn't understand that plan very well, or that summary; is that correct? A. Correct. There are sentences that are not very understandable.

Q. But are you an expert in pension and retirement plans?

A. No, I'm not. I depend on an outside [124] expert.

Q. Who do you depend on? A. Pension Associates, here in Springfield.

Q. Pardon? A. They are here in Springfield.

Q. Is it a private organization? A. Correct. They are among others, I thought as an afterthought, they are a consulting firm who we retain in the same manner that we retain Sullivan and Hayes.

Q. Now, in the course of this litigation, did Mr. Biggins and Mr. Cahillane visit with Pension Associates at your request in order to discuss the pension? A. That's correct.

These questions have come up before. And we asked Mr. Massidda, the principal of Pension Associates, to get together with the Plaintiff and work out any problems, and certainly our intent is to abide completely by the letter of the law.

Q. Did you ever hear any complaint from Mr. Biggins or Mr. Cahillane about this plan until today? A. Not until today.

MR. EGAN: Objection.

THE COURT: May answer.

* * *

[126] . . . a moment ago that you initially gave an approval for Tim Biggins to give a presentation at the API meeting? A. That's correct.

Q. To whom did you give the approval? A. I gave it at that time to Mr. Walter Biggins.

Q. Under what circumstances? A. Well, it was during the workday and I was in my office and Walter came in, and I had a lot of other things on my mind, and he said this was subsequent to my having shown him the brochure and raised the issue with him my concerns about the company — about W.F. Biggins, Incorporated, and his association with it.

But he, at the time he came in, he said my son has already gotten an engagement through Eric Fuller with the API, American Paper Institute, Coated and Decorative Group, to give a presentation on his consulting business.

It's already arranged, do you have any objection to him continuing in that?

My reaction was that I told him that geez, I'm not happy about this, your son with this company, and I don't think it's good.

[127] He said well, Eric's planning on this, it's all planned. It's going to be difficult to change it.

I said okay.

I was thinking, I guess, that we would work out a confidentiality agreement and he would sever his relationship with W.F. Biggins, and they will change the name of the firm, and I was busy and I had other things on my mind.

That evening, I had time to think about it. God, what could I possibly be thinking of to let this happen? Tim Biggins is going to go to this meeting, which my competitors are going to be present, and my other employees, and he's going to make a presentation under the banner of his father, W.F. Biggins. And he's going to hand out brochures that say W.F. Biggins on them.

I said I can't possibly let this go. I'm sending a message to my competitors one, that they can do business with employees of mine. And I'm sending the message to employees that it's all right to do this kind of consulting work with the competitors.

And that's what I wrote in the note, and said I had second thoughts.

* * *

[July 20, 1990, Volume V, p 76] . . . nature of the employer's reason, then you should hold the employer liable to the Plaintiff.

If Plaintiff has not proven the employer's statement to be pretextual, then you should find in favor of the Defendants on the age discrimination count.

If you find that the Plaintiff prevails on his claim for age discrimination, you must also determine whether the Defendants' violation of the Age Discrimination in Employment Act is willful.

The question of willfulness is important because if you find that the violation was willful, the Court will award to Plaintiff money damages in addition to those awarded by you.

I will now instruct you on the meaning of willfulness.

Under the Federal law, an act is done willfully if done voluntarily and intentionally, and with a specific intent to do something the law forbids.

You may find that Defendants willfully violated the age discrimination law if you find that one, that Defendants knew of or showed reckless disregard for, the law prohibiting age discrimination.

[77] And two, that Defendants, with bad purpose, intentionally disobeyed or ignored the law.

In sum, if you find in Plaintiff's favor on the age discrimination claim, you must also decide whether the Plaintiff proved by a preponderance of the evidence that the violation was willful. You should not award any damages for the willfulness of the violation itself. You need only decide whether the violation of the age discrimination law is willful.

Now, Plaintiff's claim for pension benefits under the Employee Retirement Income Security Act, called ERISA.

Plaintiff also alleges that the Defendants terminated Plaintiff's employment with the purpose of preventing Plaintiff from vesting in his pension benefits. Plaintiff alleges that he would have become entitled to pension benefits within a short period of time, but that Defendants fired him before his benefits could vest. Plaintiff alleges that this conduct constitutes violation of ERISA, a Federal pension law. ERISA stands for Employee Retirement Income Security Act.

ERISA prohibits employers from purposefully taking action that interferes with an . . .

. . . .

PLAINTIFF'S TRIAL EXHIBIT 7

Usage of Acrylic Foil Vehicle

1979 Through 1985

Year	* Lbs. of Base Resin Used	Estimated Press-Ready Acrylic Used	Dollar Value of (\$.40 per lb) Coatings - '89 Prices
1979	492 LBS.	1,653 LBS.	\$ 661
1980	3,940 LBS.	11,041 LBS.	4,416
1981	11,000 LBS.	33,484 LBS.	13,393-
1982	27,882 LBS.	84,872 LBS.	33,948
1983	61,671 LBS.	187,724 LBS.	75,089
1984	76,482 LBS.	232,808 LBS.	93,123
1985	76,537 LBS.	232,976 LBS.	93,190
1986	141,110 LBS.	429,533 LBS.	171,813

* Lbs. Zinpol 1,519 + Ottapol 20 - 35 Purchased

PLAINTIFF'S TRIAL EXHIBIT 10

MEMO

TO: Walter Biggins

DATE: May 30, 1986

REF: Employee Confidentiality
Agreement

Per our discussion, please review and sign the attached agreement. We'd like to have this back by or before June 9.

We cannot tolerate the kind of outside activity in areas directly relating to the business of Hazen Paper Company that you have been involved in for several years. We regard it as unethical and completely unacceptable. We trust that the agreement attached spells out clearly what we expect and that you will abide by it completely while carrying out the regular duties and responsibilities of the job of Technical Director.

With respect to the practical matter of disassociating from your consulting firm, we expect you to accomplish this by September 1. Specifically, we expect you to change the name of the firm, relinquish your ownership and control of the firm, and remove yourself from any duties of or responsibilities to the firm.

Very truly yours,

THOMAS N. HAZEN

ROBERT B. HAZEN

EMPLOYEE CONFIDENTIALITY/PATENT AGREEMENT

This Agreement is made by and between HAZEN PAPER COMPANY, hereinafter called "Hazen" and _____, hereinafter called "Employee."

Hazen and Employee agree as follows:

1. *Discoveries, Inventions, and Improvements by Employees*
Employee will promptly report to Hazen all discoveries, inventions, or improvements of whatsoever nature conceived or made by him within the scope of and during the period of his employment by Hazen. All such discoveries, inventions, and improvements which are applicable in any way to Hazen's business shall be the sole and exclusive property of Hazen. These obligations shall continue beyond the termination of the period of employment with respect to discoveries, inventions, or improvements conceived or made by the Employee during such period of employment, and shall be binding upon his heirs, executors, assigns, or other legal representatives.
2. *Maintenance of Trade Secrets and Confidential Information*
Employee recognizes that as a result of his employment by Hazen he has or may develop, obtain, or learn about trade secrets or confidential information which is the property of Hazen or which Hazen is under an obligation not to disclose, and Employee agrees to use his best efforts and utmost diligence to guard and protect said trade secrets and confidential information, and Employee agrees that he will not during or after the period of his employment by Hazen use for himself or others or divulge to others any of said trade secrets or confidential information which he may develop, obtain, or learn about during or as a result of his employment by Hazen, unless authorized to do so by Hazen in writing. Employee further agrees that if his

employment with Hazen is terminated for any reason, he will not take with him, but will leave with Hazen, all records and papers and all matters of whatever nature which contain said trade secrets or confidential information. For purposes of this Agreement, the terms "trade secrets" and "confidential information" include processes, methods, techniques, systems, formulas, patterns, models, devices, compilations, procedures, lists of customers, or any information of whatsoever nature which gives Hazen an opportunity to obtain an advantage over its competitors who do not know or use it, but it is understood that said terms do not include knowledge, skills, or information which is common to the trade.

3. *Execution of Documents*

Whenever requested by Hazen, whether during or subsequent to his employment by Hazen, Employee agrees to execute any documents or papers which Hazen may deem necessary for the protection of its interests in said discoveries, inventions, improvements, innovations, trade secrets, and confidential information, including written assignments of inventions, patents, and patent applications.

4. *Interest of Employee*

As to inventions, applications for patents, and copyrightable material in which Employee presently holds an interest and which are not subject to this Agreement:

Check one: ☐ Employee has no such property
☐ Employee has attached separate Schedule describing all such property

5. *Conflicts of Interest*

Hazen expects and the Employee agrees to devote his full time and best efforts to the business of the company and

agrees not to take any other job either as an employee or a consultant of another business during the time of his employment with Hazen without Hazen's prior written permission. Permission will not be granted if Hazen, in its sole discretion, determines that such other employment creates a conflict or potential conflict of interest with Hazen's present or future business; and provided further, Hazen reserves the right to withdraw such permission should circumstances change.

6. Upon termination of employment of the Employee for any reason whatsoever, the Employee agrees for a period of two (2) years not to directly or indirectly engage in business competitive with Hazen's business wherever Hazen had conducted business during the term of the Employee's employment, provided, however, that for the purposes of this paragraph only, business of Hazen shall mean business substantially similar to that in which the Employee was involved or engaged during his term of employment.

7. *Consideration*

The covenants herein set forth which are made by Employee are in consideration of and as a part of the terms of employment or continuation of employment, as the case may be, of the Employee by Hazen.

Signed on behalf of Hazen and Employee this ____ day of _____, 19 ____.

Employee

HAZEN PAPER COMPANY

By _____

B052886-46(25)

Title _____

PLAINTIFF'S TRIAL EXHIBIT 11

. . .

YOU ARE ASSURED OF EQUAL OPPORTUNITY

Hazen Paper Company is an Equal Opportunity Employer. We provide equal employment opportunities without regard to race, color, creed, national origin, sex, marital status, or age. This pledge applies to all employees and applicants for employment in connection with: hiring, placement, upgrading, transfer or demotion; treatment during employment; rates of pay or other forms of compensation; selection for training, layoff, or termination.

WE ALL START WITH A "GET ACQUAINTED" PERIOD

Every new employee begins employment with a "get acquainted" period that lasts 90 calendar days. This period gives you a chance to learn about Hazen Paper and gives Hazen Paper a chance to learn about you. We use this time to make sure you can handle your work satisfactorily and that your abilities are being properly applied.

Your supervisor will meet with you periodically during this period. You will be told how you are doing and what you can do to make further progress.

At the end of the 90 day period, your performance will be reviewed and if it is deemed satisfactory, you will become a regular employee.

Feel free to ask questions or seek help from your foreman during this period — or at any time during your employment. Your foreman will be glad to help you.

. . .

PLAINTIFF'S TRIAL EXHIBIT 17

. . .

HAZEN PAPER COMPANY — HOLYOKE, MASSACHUSETTS

NOTES TO FINANCIAL STATEMENTS

DECEMBER 31, 1987

6. *Employee Stock Bonus Plan:*

Hazen Paper Company instituted a noncontributory employee stock bonus plan effective December 31, 1975. All full time employees over the age of 23 who have worked for the company at least six months are eligible to join the plan. Benefits under the plan depend on the nature of separation from the company, the age of the employee at the time of separation and the length of the employee's vested service in the plan. The form and amount of contributions to the plan is at the discretion of the board of directors of the Company.

No contributions to the plan were approved for 1987 and 1986.

In December, 1987 the Company repurchased all preferred stock from the plan at par value. All funds in the plan after repurchase of the stock plus prior years employee contributions to the pension plan were placed in separate accounts for each employee under the 401(K) retirement plan portion of the stock bonus plan. Commencing January, 1988 employees may make contributions to their 401(K) accounts. Employee contributions to the 401(K) plan will be matched by the company at the rate of 10%.

7. *Income Taxes:*

The following is a reconciliation of the provision for taxes on income at the applicable statutory income tax rates to the tax provision in the financial statements:

	1987	1986
<i>Taxes Currently Payable:</i>		
Provision at statutory rate	\$826,516	\$497,334
Investment and other tax credits	(10,700)	(21,095)
Tax savings related to FSC income		(14,703)
Miscellaneous tax adjustments	356	6,649
Deferred tax related to depreciation	(73,231)	(99,841)
<i>Net Taxes Currently Payable</i>	742,941	368,344
<i>Deferred Taxes:</i>		
Related to depreciation		99,841
<i>Total Federal and State Taxes per Statements</i>	<u>\$742,941</u>	<u>\$468,185</u>

Deferred tax liability, as discussed in Note 9, is not recognized beginning in 1987.

* * *

PLAINTIFF'S TRIAL EXHIBIT 18

JOB INSURANCE

REQUEST FOR SEPARATION AND WAGE INFORMATION - NEW CLAIM
RETURN COMPLETED FORM TO:

Commonwealth of Massachusetts
Division of Employment Security
136 Worthington St, PO Box 640
Springfield MA 01101

Seq 001	Social Security No. 030-12-8123	Date of Claim 06-22-86
Filing Date 06-25-86	Mailing Date 06-26-86	Sex M
05-29-25	IP Y	Employer ID No. 00-307130

CLAIMANT NAME AND ADDRESS:	EMPLOYER NAME AND ADDRESS
Walter F. Biggins	Hazen Paper Co.
52 Redfern Dr.	Foot of Jackson Street
Longmeadow, MA 01106	Post Office Box 189
	Holyoke MA 01401

PART I

A. PERIOD LAST EMPLOYED: FROM _____ THROUGH _____

B. SEPARATION REASON:
Voluntary Quit

C. SEPARATION IS:
Permanent

D. GROSS WAGES PAID DURING 52 WEEK BASE PERIOD

Quarterly Periods	Gross Wages Paid	Date Started	Date Stopped
From To			
06/23/85 06/30/85	\$ paid on monthly basis		
Qtr. Ending			
09/30/85	\$17,256.00	07/1/85	09/30/85
Qtr. Ending			
12/31/85	\$17,556.00	10/1/85	12/31/85
Qtr. Ending			
03/31/86	\$23,656.00	01/1/86	03/31/86
04/01/86 06/21/86	\$19,336.00	04/1/86	06/21/86
TOTAL PAID	\$77,804.00		

Signature: s/ Rossmeisl
Date: June 30, 1986

Title: Controller
Tel: (413) 538-8204

PLAINTIFF'S EXHIBIT 25

HAZEN PAPER COMPANY

EMPLOYMENT AGREEMENT

1. Hazen Paper Company agrees to employ Timothy McDonald as Technical Director and Timothy McDonald agrees to work exclusively for the Hazen Paper Company. In entering this Employment Agreement, both parties desire that the relationship between Mr. McDonald and the Hazen Paper Company will be mutually beneficial with both parties growing together and the employee working until the normal age of 65.

It is understood, however, that circumstances change and that one or both of the parties may wish to terminate it. The employee may terminate the agreement by giving 60 days written notice or in accordance with the provisions of Article #4. The Company may terminate the Agreement with 100 days written notice or in accordance with the provisions of Article #4.

2. *Duties:*

Timothy McDonald will be employed as Technical Director. The duties and responsibilities of the Technical Director are spelled out in the attached Job Description. (Appendix A). These duties may be further defined and amended from time to time, by mutual agreement.

3. *Extent of Service and Conflicts of Interest:*

The the[sic] employee will devote all his working time, attention and energies to the interest of Hazen Paper Company and agrees not to take any other job either as an employee or a consultant of another business without Hazen's prior written permission. Permission will not be granted if Hazen, in its' sole discretion, determines that such other employment creates a conflict or potential conflict of interest with Hazen's present or

future business; and provided further, Hazen reserves the right to withdraw such permission should circumstances change.

4. *Compensation and Benefits:*

Hazen Paper Company will, in consideration for the services to be rendered by the employee hereunder, compensate the employee in the manner set forth in Appendix B attached hereto.

5. *Termination Without Notice:*

Timothy McDonald may *not* terminate his employment with Hazen Paper Company without notice as outlined in Section I. unless;

A. Hazen materially breaches the terms of this contract. His employment will, of course, be terminated by his death.

Hazen Paper Company may not terminate Timothy McDonald's employment without notice as outlined in Section I during the employment term, unless;

A. The employee materially breaches the terms of this contract.*

B. Unless, the company pays a cash settlement equivalent to 100 days pay.

C. Unless, the Company gives the employee six (6) months written notice on the occasion of the employee becoming permanently disabled.

In the event one of the parties gives written notice as provided in Section I, the other party may elect to terminate the Agreement immediately.

*The employee's Job Description is considered a part of this contract. The employee's unwillingness or inability to perform this job as outlined would be considered a breach of this contract but the company would be required to formally review, at least twice, the employee's deficiencies in performance, giving him a reasonable chance to correct them before this would be considered a valid reason for termination without notice.

6. *Non-Competition:*

Upon termination of employment of the Employee for any reason whatsoever, the Employee agrees, for a period of six (6) months not to directly or indirectly engage in business competitive with Hazen's business wherever Hazen has conducted business during the term of the Employee's employment, provided, that for the purposes of this paragraph only, business of Hazen shall mean business substantially similar to that in which the Employee was engaged or involved during his term of employment. Selling similar products or rendering similar services to Hazen's customers or otherwise interfering with Hazen's relationship with its' customers would clearly fall into this definition of competition, but this does not exclude other possible types of competitive activity that might be covered by this agreement.

7. *Discoveries, Inventions and Improvements:*

Employee will promptly report to Hazen all discoveries, inventions, or improvements of whatsoever nature conceived or made by him within the scope of and during the period of his employment by Hazen. All such discoveries, inventions, and improvements which are applicable in any way to Hazen's business shall be the sole and exclusive property of Hazen. These obligations shall continue beyond the termination of the period of employment with respect to discoveries, inventions, or improvements conceived or made by the Employee during such period of employment, and shall be binding upon his heirs, executors, assigns, or other legal representatives.

8. *Maintenance of Trade Secrets and Confidential Information:*

Employee recognizes that as a result of his employment by Hazen Paper Company, he has or may develop, obtain, or learn about trade secrets or confidential information which is the property of Hazen or which Hazen is under obligation not to disclose, and Employee agrees to use his best efforts and

utmost diligence to guard and protect said trade secrets and confidential information which he may develop, obtain or learn about during or as a result of his employment by Hazen, unless authorized to do so by Hazen in writing. These obligations in respect to "Trade Secrets" and "Confidential Information" shall continue beyond the termination of his employment and will be binding on his heirs, executors, assigns or other legal representatives. Employee further agrees that if his employment with Hazen is terminated for any reason, he will not take with him, but will leave with Hazen, all records and papers and all matters of whatever nature which contain said trade secrets or confidential information. For purposes of this Agreement, the terms "trade secrets" and "confidential information" include processes, methods, techniques, systems, formulas, patterns, models, devices, compilations, procedures, lists of customers, information about products and services Hazen provides to its customers, price and cost information, or any information of whatsoever nature which give Hazen an opportunity to obtain an advantage over its competitors who do not know or use it, but it is understood that said terms do not include knowledge, skills, or information which is common to the trade.

9. *Execution of Documents:*

Whenever requested by Hazen, whether during or subsequent to his employment by Hazen, Employee agrees to execute any documents or papers which Hazen may deem necessary for the protection of its interest in said discoveries, inventions, improvements, innovations, trade secrets, and confidential information, including written assignments of inventions, patents, and patent applications.

10. *Interest of Employee:*

As to inventions, applications for patents, and copyrightable material in which Employee presently holds an interest and which are not subject to this Agreement:

check one:

- ☒ Employee has no such property.
☐ Employee has attached separate Schedule describing all such property.

11. *Benefit:*

This Agreement shall be binding upon and insure to the benefit of the successors to the parties and may not be assigned by any party thereto without the prior written consent of the others.

12. *Applicable Law:*

This Agreement shall be interpreted and construed in accordance with the laws of the State of Massachusetts.

13. *Arbitration:*

Any dispute among the parties hereto as to the interpretation or application of the provisions of this Agreement shall be submitted to binding arbitration pursuant to the rules of the American Arbitration Association.

14. *Entire Agreement:*

This Agreement constitutes the entire agreement among the parties with respect to the employment of the Employee by Hazen.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the first date above written.

HAZEN PAPER COMPANY:

By: s/ THOMAS N. HAZEN

Employee: s/ TIMOTHY R. McDONALD

DATE: *September 15, 1986*

PLAINTIFF'S TRIAL EXHIBIT 26

SUMMARY PLAN DESCRIPTION
 FOR THE
 HAZEN PAPER COMPANY
 RETIREMENT PROGRAM

Prepared by:

PENSION ASSOCIATES, INC.
 1243 Main Street
 Springfield, MA 01103

Telephone: (413) 781-1261

Paula Martin

May, 1981

SECTION 7

Benefits in Event of Termination of Employment

Vesting

First of All, What Does "Vesting" Mean?

"Vesting" is your right to a future benefit under the Plan. Once you are vested, it means that the benefits you have earned under the Plan are "non-forfeitable"; and, therefore, cannot be taken away from you if you live to your Retirement Date — even if you quit or are fired.

When Am I Vested?

1. *When You Reach Your Normal Retirement Date — Age 65*
 You will be automatically 100 % vested in your Earned Pension at Age 65 regardless of your years of Credited Service provided you are a participant in the Plan at Age 65 and were hired prior to your 60th birthday.

2. *When You Qualify for Early Retirement*

Your Earned Pension is automatically 100% vested if you leave employment after qualifying for Early Retirement . . . after completing 10 years of Credited Service and attaining Age 60.

3. *When You Have Completed Ten Years of Credited Service*

After you have completed 10 years of Credited Service, your Earned Pension is vested. Therefore, if you should terminate your employment, voluntarily or involuntarily, at any time after completing 10 years of Credited Service, you will be 100% vested in your Earned Pension and, therefore, have a non-forfeitable right to a future benefit.

When Would I Not Be Vested?

If you terminate employment before Age 65 with less than 10 years of Credited Service, you will not receive any benefit under this Plan.

DEFENDANTS' TRIAL EXHIBIT F

ARE YOU FAMILIAR WITH THE
RIGHT TO KNOW LAW?

We Can Help You To Understand
It Better And To Comply With It.

W.F. Biggins Associates, Inc.
52 Redfern Drive
Longmeadow, MA 01106
413-567-7890

What W.F. Biggins Associates, Inc. Will Do For You:

1. Conduct a plant audit.
2. Obtain all MSDS from suppliers and file with the DEQE and the Municipal Coordinator.
3. Furnish and instruct the proper use of required labels.
4. Train all employees annually.
5. Train all new employees within 30 days of hiring date.
6. Keep permanent records of training dates of all employees.
7. Maintain a file of all MSDS for 30 years.
8. Update the MSDS and file semi-annually.
9. Obtain the MSDS, upon notification, when a new substance is used.
10. Act as the contact person, if desired.
11. Provide legal testimony, if desired.

12. Provide a central life and legal notification for posting in the workplace.
13. Provide a copy of MSDS upon employee or Municipal Coordinator request.

W.F. Biggins Associates, Inc.

Training Is Supervised By A Department Of Labor And
Industries Registered Trainer

DEFENDANTS' TRIAL EXHIBIT C

March 21, 1988

DUN & BRADSTREET, INC.

Be Sure Name, Business and
Address Match Your File

Answering Inquiry

Subscriber [Illegible]

Original Report

Substitute For Report Of Even Date

DUNS: 18-505-0465
Biggins, W.F. Associates, Inc.
52 Redfern Dr
(Longmeadow)
Springfield, MA 01106
Tel: 413 567-7980

Date Printed
Mar 16 1988

Business Consulting
Sic No.
73 92

Summary

Rating	ER8
Started	1986
Payments	See Below
Sales	\$100,000 (Proj)
Worth F	\$(2,542)
Employs	3
History	Clear

Chief Executive: Walter F. Biggins, Pres.

Payments (Amounts may be rounded to nearest figure in prescribed ranges)

Reported	Paying Record	High Credit	Now Owes	Past Due	Selling Terms	Last Sale Within
03/88	Ppt	750	-0-	-0-	N30	1 Mo
03/88	Ppt	2500	-0-	-0-	N30	
03/88	Ppt	500	-0-	-0-	N30	

* Each experience shown represents a separate account reported by a supplier. Updated trade experiences replace those previously reported.

Finance

- * A financial spread sheet of comparatives, ratios, and industry averages
- * May be available. Order a DUNS financial profile via your Dunsprint
- * Terminal or by calling DUNS dial at 1-800-DNB-DIAL.

03/11/88 Fiscal statement dated OCT 31, 1987:

Cash	\$ 0	Accts Pay	\$ 1,931
		Officer Loan	8,226
Curr Assets	0	Curr Liabs	10,157
Fixt & Equip	8,271	CAPITAL STOCK	1,000
Deposits	346	RETAINED EARNINGS	(2,542)
Total Assets	8,615	Total	8,615

Annual sales \$64,220; operating expenses \$65,743. Net income \$(2,442).

Submitted MAR 11 1988 by Walter F. Biggins, president. Prepared from statement [illegible] by Accountant Owen Sutton. Extent of audit, if any, not indicate[d].

—0—

On MAR 11 1988 Walter F. Biggins, president, submitted the above figure[s.]

He submitted the following partial estimates dated MAR 11 198[8.]

Cash \$11,000 Accts Pay \$25,000 Accts Rec \$2,000
Projected annual sales are \$100,000.

On MAR 11, 1988 management stated that subject will be relocating to commerc[ial] space. Apr. 1, 1988, new address will be The Mill (Dwight St), Holyoke, [MA.]

HISTORY

03/11/88

WALTER F. BIGGINS, Pres.

Director(s): The Officer(s)

Incorporated Massachusetts Mar 19 1986. Authorized capital consists of [...] shares common stock, no par value.

Business started 1986 by Walter F. Biggins. 100 % of capital stock is owned [...] officer. Starting capital \$5,500 derived from \$5,500 savings.

WALTER F. BIGGINS born 1925. 1986 started here. 1976-1986 Hazen Paper Compa[ny,] Holyoke, MA, technical director. 1966-1976 C H Dexter, Windsor Locks, CT, prod[uct] development. 1955-1966 Ludlow Corp, Needham, MA, quality control.

OPERATION

See Reverse Side For Glossary Of Terms (Continued)

This report furnished pursuant to contract for the exclusive use of the subscriber as one factor to consider in connection with C&E Insurance marketing or other business decisions. Contains information compiled from sources which Dun & Bradstreet, Inc. does not control whose information unless otherwise ILLEGIBLE in the report has not been verified in furnishing this report Dun & Bradstreet, Inc. in no ... or timeliness of the information provided.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Caption Omitted]

DEFENDANTS' MOTION FOR A DIRECTED VERDICT

All of Plaintiff's evidence having been introduced, Defendants Hazen Paper Company, by its attorneys, hereby moves the Court, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, to direct a verdict in Defendants' favor as to each Count in this action on the following grounds:

1. Plaintiff has not only clearly articulated, but amply documented a legitimate, non-discriminatory reason for Plaintiff's termination — his refusal to sign a reasonable confidentiality agreement drafted by his employer in response to his disloyal and unethical conduct. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-12 (1st Cir. 1979). In the face of this proffer, Plaintiff has failed to present any evidence of pretext which could persuade a reasonable trier of fact that he was the victim of age discrimination. No evidence has been introduced indicating a pattern, much less a single instance of disparate treatment involving an older Hazen employee which would tend to prove that Plaintiff himself was the victim of discrimination. *Medina Munoz v. R.J. Reynolds*, 896 F.2d 5, 10 (1st Cir. 1990). The evidence leads inexorably to the conclusion that Plaintiff was singled out not because of his age but because of Hazen's discovery of Plaintiff's extensive history of double dealing and betrayal.

Plaintiff's sole evidence of discrimination is alleged remarks made in passing by the Defendants. Such evidence, when compared to the overwhelming evidence of disloyalty presented by the Defendants, cannot persuade a reasonable trier of fact that Plaintiff's age was the "determinative" reason for his termination. *Loeb*, 600 F.2d at 1019.

2. Apart from Plaintiff's own suspect opinion as to how "far" he was away from achieving vested status in Hazen's pension plan, no evidence has been introduced establishing the requisite "specific intent" to deprive Plaintiff of his benefits in violation of ERISA. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). Plaintiff's evidence of an ERISA violation consists exclusively of this "temporal" evidence — he was "some time away" from being vested in his pension. Such evidence is plainly insufficient. *Donohue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (N.D. Pa. 1986). The evidence clearly indicates that Plaintiff's unethical conduct, not an illegitimate reason in violation of ERISA, was the "motivating" factor behind his dismissal. *Gavalik*, 812, F.2d 834.

3. Plaintiff has failed to present any evidence which could persuade a reasonable trier of fact that he is the owner of Hazen's water-based acrylic. Plaintiff has essentially conceded that the development of the water-based acrylic was within the scope of his employment duties while he was Technical Director of Hazen. The evidence shows unequivocally that the development of new products, such as the water-based acrylic, was encompassed by the job description he was given by his employer. In these circumstances, Hazen is the lawful owner of the acrylic. *Solomons v. United States*, 137 U.S. 342 (1890); *National Development Company v. Gray*, 316 Mass. 240, 55 N.E.2d 783 (1944).

4. The evidence clearly shows that no definitive promise of stock was ever made by Hazen to Plaintiff. Plaintiff's own testimony indicates that any alleged stock discussions were conditional and, therefore, did not rise to the level of an objective manifestation of intent necessary for contract formation.

Further, no evidence has been introduced that would lead a reasonable finder of fact to conclude that Plaintiff was the victim of fraud. There is no evidence that Plaintiff suffered detriment or damage in reliance upon a promise made by Hazen, and that such promise was made to induce Plaintiff's reliance. *Slang v. Westwood*, 366 Mass. 688, 322 N.E.2d 768 (1875). Accordingly, Defendants' directed verdict should be granted.

5. Because the evidence presented shows unequivocally that Defendants, not Plaintiff, is the lawful owner of the water-based acrylic, Defendants cannot be liable for its conversion. Further, because Plaintiff has conceded that Defendants contributed material and equipment toward the development of the acrylic, Defendants could lawfully use the acrylic and cannot be liable for its conversion under the Shop Right doctrine. *National Development v. Gray*, 316 Mass. at 247, 55 N.E.2d at 787 (1944).

6. Plaintiff's case is devoid of any evidence that he was deprived of a legally protected right through "threats, intimidation and coercion" in violation of the Massachusetts Civil Rights Law. *Bell v. Mazza*, 394 Mass. 176, 179-80 (1985). Absent any evidence of threats, intimidation or coercion on the part of the Defendants, a directed verdict is warranted.

7. As a matter of law, Plaintiff has failed to show that he had an implied or express contract with Defendants based on Defendants' personnel manual and policies. Plaintiff has not shown that he ever entered into negotiations with the Defendants regarding the terms and conditions of his employment. Nor has Plaintiff indicated that any term of employment was expressly stated in the manual. Nor did Plaintiff sign the manual. In the absence of such evidence, Plaintiff has failed to establish a triable issue for the jury that he was other than an em-

ployee at will. *Jackson v. Action For Boston Community Development, Inc.*, 403 Mass. 8, 525, N.E.2d 411 (1988).

Respectfully submitted,

HAZEN PAPER COMPANY

By s/ PATRICK MCGINLEY

PATRICK W. MCGINLEY, ESQ.

SULLIVAN & HAYES

Attorneys for the Defendants

1500 Main Street, Suite 1712

Springfield, Massachusetts 01115

Telephone: (413) 736-4538

Dated this 18th day of July, 1990
at Springfield, Massachusetts.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Caption Omitted]

DEFENDANTS' RENEWED MOTION FOR A DIRECTED VERDICT

All evidence having been introduced in this case, Defendants Hazen Paper Company, by its attorneys, hereby renews its Motion For A Directed Verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Defendants submit that because of the specific grounds articulated in its Motion For A Directed Verdict, no reasonable trier of fact could find in Plaintiff's favor as to each count in this action.

Respectfully submitted,

HAZEN PAPER COMPANY

By s/ PATRICK MCGINLEY

PATRICK W. MCGINLEY, ESQ.

SULLIVAN & HAYES

Attorneys for the Defendants

1500 Main Street, Suite 1712

Springfield, Massachusetts 01115

Telephone: (413) 736-4538

Dated this 19th day of July, 1990
at Springfield, Massachusetts.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted]

SPECIAL VERDICT

A. *Age Discrimination in Employment*

1. Do you find by a preponderance of the evidence that defendants discriminated against plaintiff on the basis of age, in violation of the Age Discrimination in Employment Act?

☒ Yes ☐ No

(If you answered "yes" to question 1, go on to question 2. If you answered "no" to question 1, skip questions 2 and 3, and go on to question 4.)

2. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to defendants' violation of the Age Discrimination in Employment Act?

Five hundred sixty thousand seven hundred seventy-five \$560,775.

3. Do you find that defendants willfully violated the Age Discrimination in Employment Act?

☒ Yes ☐ No

B. *Employee Retirement Income Security Act ("ERISA")*

4. Do you find by a preponderance of the evidence that defendants fired plaintiff for the purpose of preventing plaintiff from attaining vestment of pension benefits, in violation of ERISA?

☒ Yes ☐ No

(If you answered "yes" to question 4, go on to question 5. If you answered "no" to question 4, skip question 5 and go on to question 6.)

5. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to defendants' violation of plaintiff's rights under ERISA?

One hundred thousand \$100,000.

C. Wrongful Discharge: Fraud

6. Do you find by a preponderance of the evidence that defendants and plaintiff had agreed that defendants would compensate plaintiff with shares of Hazen Paper Company stock?

☒ Yes ☐ No

(If you answered "yes" to question 6, go on to question 7 below. If you answered "no" to question 6, skip questions 7-10, and go on to question 11.)

7. Do you find that defendants wrongfully discharged plaintiff in order to deprive plaintiff of the promised stock compensation, in violation of Massachusetts law?

☒ Yes ☐ No

(If you answered "yes" to question 7, go on to question 8 below. If you answered "no" to question 7, skip question 8, and go on to question 9.)

8. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to defendants' wrongful discharge of plaintiff?

One dollar \$1.00.

9. Do you find by a preponderance of the evidence that defendants committed fraud by failing to compensate plaintiff with stock as promised, in violation of Massachusetts law?

☒ Yes ☐ No

(If you answered "yes" to question 9, go on to question 10 below. If you answered "no" to question 9, skip question 10, and go on to question 11.)

10. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to defendants' fraud?

Three hundred fifteen thousand, ninety eight \$315,098.

D. Declaratory Judgment

11. Do you find, by a preponderance of the evidence, that plaintiff was the inventor, developer, and sole, rightful owner of the paper coating formula and method?

☐ Yes ☒ No

(If you answered "yes" to question 11, go on to question 12. If you answered "no" to question 11, skip question[s] 12 and 13, and go on to question 14.)

E. Conversion

12. Do you find by a preponderance of the evidence that defendants converted unto themselves the paper treatment formula and method properly belonging to plaintiff, in violation of Massachusetts law?

☐ Yes ☐ No

(If you answered "yes" to question 12, go on to question 13 below. If you answered "no" to question 12, skip question 13, and go on to question 14.)

13. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to defendants' conversion?

_____ (in words)
\$ _____ (in figures).

F. Massachusetts Civil Rights

14. Do you find by a preponderance of the evidence that defendants interfered with plaintiff's exercise of his civil rights through the use of threats, intimidation or coercion?

☒ Yes ☐ No

(If you answered "yes" to question 14, go on to question 15. If you answered "no" to question 14, skip question 15 and go on to question 16.)

15. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to the violation of his civil rights?

One dollar \$1.00.

G. Breach of Employment Contract

16. Do you find by a preponderance of the evidence that plaintiff and defendants had an employment contract, express or implied?

☒ Yes ☐ No

(If you answered "yes" to question 16, go on to question 17. If you answered "no" to question 16, skip questions 17 and 18, sign and date the Special Verdict form, and tell the Marshal that you have completed your deliberation.)

17. Do you find by a preponderance of the evidence that defendants breached the employment contract by firing plaintiff?

☒ Yes ☐ No

(If you answered "yes" to question 17, go on to question 18. If you answered "no" to question 17, skip question 18, sign and date the Special Verdict form, and tell the Marshal that you have completed your deliberation.)

18. What amount of money damages, if any, do you award to plaintiff as compensation for harm suffered due to defendants breach of the employment contract?

Two-hundred sixty six thousand, eight hundred ninety seven
\$266,897.

s/ ILLEGIBLE

Foreperson

July 20, 1990

Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

JUDGMENT IN A CIVIL CASE

- ☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
and
- ☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the special verdict of the jury and memorandum and order of the Court,

1. Judgment for the Plaintiff on his claim of age discrimination with damages awarded in the amount of \$560,775.00.
2. Judgment for the Plaintiff with liquidated damages awarded by the court of \$560,775.00, based on the jury's finding of "willfulness".
3. Judgment for the Plaintiff on his claim under ERISA with damages awarded in the amount of \$100,000.00.
4. Judgment for the Plaintiff on his claims of wrongful discharge and fraud with damages awarded in the amount of \$315,099.00.
5. Judgment for the Plaintiff on his claim of interference with his civil rights under Massachusetts law with damages awarded in the amount of \$1.00.
6. Judgment for the Plaintiff on his claim of breach of the employment contract with damages awarded in the amount of \$266,897.00.

7. Interest, computed at 12% on Plaintiffs' awards on his claims of wrongful discharge, fraud, state civil rights and breach of contract, amounts to \$176,703.84, making a total award on these claims of \$758,699.84.
8. Interest, computed at 7.88%, on Plaintiff's claim under ERISA, amounts to \$19,937.51, making a total award on this claim of \$119,937.51.
9. Judgment for the Defendants on Plaintiff's request for a declaratory judgment and his claim of conversion.

Approved as to form: FRANK H. FRIEDMAN
Chief United States District Judge

August 27, 1990
Date

ROBERT J. SMITH, JR.
Clerk

s/ JOHN C. STUCKENBRUCK
(By) DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

DEFENDANTS' MOTIONS FOR JUDGMENT
NOTWITHSTANDING THE VERDICT OR, IN THE
ALTERNATIVE, FOR A NEW TRIAL

Defendants, having at the close of all the evidence moved the Court to direct a verdict in its favor, which motion was denied and thereafter a verdict having been returned by the jury in favor of Plaintiff, Defendants now move the Court, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with Defendant's Motion for a Directed Verdict. Defendants do not move to set aside that portion of the verdict finding legal ownership of the water-based acrylic formula in Hazen. The specific grounds in support of this Motion are set forth and discussed in the accompanying Brief In Support Of Defendant's Motion For Judgment Notwithstanding the Verdict.

In the alternative, and if Defendant's Motion for Judgment Notwithstanding the verdict is not granted, Defendant moves that the Court, pursuant to Rule 59 of the Federal Rules of Civil Procedure, set aside the verdict and judgment entered thereon and grant Defendant a new trial for the reasons set forth in the accompanying Brief in Support of Defendant's Motion For A New Trial.

Respectfully submitted,

HAZEN PAPER COMPANY

BY s/RICHARD D. HAYES,

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[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

AMENDED JUDGMENT IN A CIVIL CASE

- ☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- and
- ☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the memorandum and order of the Court entered on April 5, 1991 and special verdict of the jury.

1. Judgment for the Plaintiff on the claim of age discrimination with damages awarded in the amount of \$560,775.00. Interest, computed at the T-Bill rate of 6.46 % amounts to \$114,313.43. Total award — \$675,088.43.
2. Judgment for the Plaintiff on the ERISA claim with damages awarded in the amount of \$100,000.00. Interest, computed at the T-Bill rate of 6.46 % amounts to \$20,384.77. Total award — \$120,384.77.
3. Judgment for Plaintiff on claims of wrongful discharge and fraud with damages awarded in the amount of \$315,099.00.
4. Judgment for the Plaintiff on claim of breach of contract with damages awarded in the amount of \$266,897.00.
5. Interest, computed at the rate of 12 % on claims of wrongful discharge, fraud and breach of contract, amounts to \$220,382.52. Total award on these claims — \$802,378.52.

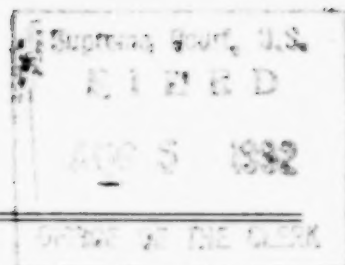
6. Judgment for Defendants on Plaintiff's claim for liquidated damages.
7. Judgment for Defendants on Plaintiff's claim of interference with civil rights.
8. Judgment for Defendants on Plaintiff's request for declaratory judgment and his claim of conversion.
9. Judgment for Plaintiff with Attorneys' fees of \$175,564.57 and costs of \$9,760.07.

April 12, 1991
Date

ROBERT J. SMITH, JR.
Clerk

s/ JOHN C. STUCKENBRUCK
(By) DEPUTY CLERK

No. 91-1600



**In the
Supreme Court of the United States**

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Courts below erred in sustaining Respondent's claim under the Age Discrimination in Employment Act, where the finding of age discrimination was based upon the logically irrelevant issue of pension vesting, and not upon considerations of age?

2. Whether the Court of Appeals erred in reinstating an award of liquidated damages that had been set aside by the District Court, where there was no evidence from which the jury could draw a reasonable inference that Hazen Paper Company's decision to discharge Biggins from employment was a "willful" violation of the Age Discrimination in Employment Act?

LIST OF PARTIES

The parties to the proceedings below were Respondent Walter F. Biggins and Petitioners Hazen Paper Company¹, Robert Hazen and Thomas N. Hazen.

¹ Hazen Paper Company is a private, closely held corporation organized under the laws of the Commonwealth of Massachusetts. The Company has no parent or subsidiary entities.

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In the
Supreme Court of the United States

No. 91-1600

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Bownes, Senior Judge) is reported at 953 F.2d 1405 (1st Cir. 1992), and is reprinted in the Appendix to the Petition for a Writ of Certiorari at pp. A-5 – A-49.

The Memorandum and Order of the United States District Court for the District of Massachusetts (Freedman, C.J.) has not been reported. It is reprinted in the Appendix to the Petition for a Writ of Certiorari at pp. A-50 – A-88.²

² The Petitioners' Petition for a Writ of Certiorari will hereinafter be referenced as "Cert. Pet." The parties' Joint Appendix will be referenced as "J.A." The Record Appendix used in the Court of Appeals below will be referenced as "[Vol. No.] R.A."

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was issued on January 8, 1992. Cross-petitions for rehearing were denied on January 29, 1992. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*, provides in material part as follows:

§ 623. *Prohibition of age discrimination*

(a) *Employer Practices.* It shall be unlawful for an employer — 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

§ 626. *Recordkeeping, investigation, and enforcement*

(b) *Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.*

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum

wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter.

STATEMENT OF THE CASE

This case arises out of the termination of Respondent Walter F. Biggins' employment with Hazen Paper Company ("Hazen Paper" or the "Company") in June, 1986. Respondent was discharged from his position as Technical Director of Hazen Paper, a small family-owned business located in Holyoke, Massachusetts, following the Hazens' discovery that Biggins — contrary to prior assurances he had given them — was marketing to competitors of the Company services of the type he performed for Hazen Paper. Upon making this discovery, the Hazens asked Biggins to sign a confidentiality agreement as a condition of continuing employment with the Company. Respondent refused to sign the confidentiality agreement unless he received a guarantee of additional compensation in the form of increased salary and/or Company stock, and his employment was thereafter terminated. At the time of his discharge, Respondent was 62 years of age, and, since he had begun working for the Company at age 52, was several months shy of the ten years of service required to vest in the Hazen Paper pension plan.

In February, 1988, Biggins commenced an action in the United States District Court for the District of Massachusetts against the Company, its President, Robert Hazen, and its Treasurer, Thomas Hazen. In an amended complaint (J.A. 27-36), Respondent asserted among other claims that his discharge was the product of unlawful age bias, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*³ The parties en-

³ The amended complaint set forth additional federal and state law claims arising out of the termination of Biggins' employment, which claims are not the subject of review in this Court.

gaged in active discovery from February, 1988 through February, 1990. Following a denial of the defendants' motion for summary judgment, the case proceeded to trial.

Beginning July 16, 1990 and continuing for four successive days, the case was tried before a six-member jury. At trial, Respondent argued that the Petitioners' articulated reason for discharging him from employment — *viz.*, his refusal to sign a proffered confidentiality agreement following revelation of his previously undisclosed business dealings with Hazen Paper competitors — was pretextual, and that the Hazens' true motivation was to prevent his imminent vesting in the Company pension. At the close of plaintiff's case, Petitioners moved for a directed verdict, contending, *inter alia*, that the evidence did not permit a reasonable jury finding in favor of the plaintiff on his claim of age discrimination. (J.A. 188-91.) The court denied this motion without opinion. (J.A. 7.) At the conclusion of all the evidence, Petitioners renewed their motion for a directed verdict (J.A. 192), which motion was again denied. (J.A. 7.) On July 20, 1990, the jury heard closing arguments of counsel, received the judge's charge, and after deliberating just 3½ hours returned a verdict in favor of the Respondent. (J.A. 193-97.)

Responding to questions posed on a special verdict form, the jury found Hazen Paper liable under the ADEA for compensatory damages in the sum of \$560,775.00. The jury also found the Petitioners' purported violation of the statute to have been "willful". (J.A. 193.) Accordingly, the District Court assessed an additional \$560,775.00 in "liquidated damages" against the Company pursuant to Section 7(b) of the ADEA, 29 U.S.C. § 626(b) (J.A. 193; I R.A. 46-46C.)⁴ On August 27, 1990, the clerk entered final judgment in favor of Respondent in the amount of \$1,803,547.00, together with interest on his non-age discrimination claims in the amount of \$196,641.35, for a

⁴ The jury additionally awarded Respondent \$100,000.00 for interference with his pension vesting in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 895, 29 U.S.C. § 1140, \$266,897.00 for breach of contract (reversed on appeal), and \$315,100.00 on certain state law tort claims. (J.A. 193-97.)

total award aggregating in excess of \$2,000,000.00. (J.A. 198-99.)

Petitioners thereupon filed a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (J.A. 200), together with a motion to alter or amend the judgment for purposes of remitting the damages award. (I R.A. 48-49.) On April 5, 1991, the District Court issued a Memorandum and Order upholding the jury's finding of age discrimination liability against Hazen Paper under the ADEA. The court held that "the jury could reasonably have found that defendants knew of plaintiff's [soon-to-be-vested] status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights." (Cert. Pet. A-56.) However, after acknowledging that Biggins' proof of age discrimination was "a bit thin", the District Court held the evidence inadequate as a matter of law to sustain the jury's additional finding of willfulness, and struck the award of liquidated (double) damages previously assessed against Hazen Paper. (Cert. Pet. A-56 - A-62.)

On appeal, the First Circuit affirmed the judgment with respect to underlying ADEA liability, but reversed the lower court's entry of judgment n.o.v. against the jury's willfulness finding, thereby reinstating approximately \$420,000 in liquidated damages.⁵ Relying principally upon what it found to be a supportable inference that the Hazens' real reason for terminating Biggins' employment was to interfere with his pension vesting, the Court of Appeals held that a claim of age discrimination had been made out. In the penultimate paragraph of its discussion of Respondent's ADEA claim — the only section of the opinion addressing the sufficiency of the evidence to support a finding of age discrimination — the Court of Appeals reasoned that:

"[T]he jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights

⁵ The Court of Appeals had remitted Respondent's predicate ADEA damages by roughly \$120,000.00, which remittitur in turn operated to reduce the liquidated damages award by an equivalent amount. (Cert. Pet. A-22 - A-23.)

vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years."

(Cert. Pet. A-14.)

In reinstating the jury's award of liquidated damages, the First Circuit reversed the District Court's ruling that evidence of age discrimination which was "thin", "sparse" and in large part "circumstantial" and "self-serving" (Cert. Pet. A-56, A-62) was legally insufficient to meet the higher threshold required for a "willful" violation of the ADEA. Notwithstanding its acknowledgment that several other circuit courts have articulated heightened standards for willfulness liability comparable to the one applied by the District Court below, the First Circuit adopted a contrary test for liquidated damages which has the effect of authorizing such damages in virtually *every* case where disparate treatment is found under the ADEA.⁶

Following issuance of the First Circuit's decision, both parties sought reconsideration through timely petitions for rehearing and suggestions for rehearing *en banc*.⁷ On January 29, 1992, the Court of Appeals denied each of these cross-petitions. (Cert. Pet. A-1 - A-2.) On April 2, 1992, the Hazens filed a Petition for a Writ of Certiorari with this Court, seeking review of the Court of Appeals' rulings with respect to both predicate

⁶ The January 8, 1992 decision of the First Circuit upheld the jury's willfulness finding by placing primary emphasis on Thomas Hazen's testimony that "he was 'absolutely' aware that age discrimination was illegal," and by concluding that such an acknowledgment "is as strong evidence of a knowing violation of ADEA as a plaintiff could wish." (Cert. Pet. A-20.)

⁷ Biggins sought rehearing on the Court of Appeals' affirmance of the District Court's refusal to enhance his statutory attorney's fee (\$175,564.75) to reflect the contingent nature of his legal representation. Following the First Circuit's denial of rehearing, Biggins petitioned this Court for certiorari (No. 91-1818) on the issue of his request for enhanced attorney's fees. That petition was denied on June 29, 1992.

ADEA liability and liquidated damages.⁸ On June 22, 1992, this Court granted the Hazens' Petition for a Writ of Certiorari on each of the two questions presented therein.

STATEMENT OF FACTS⁹

The facts herein are set forth in considerable detail, because the legal arguments addressed to this Court are best developed in the context of a full exposition of the evidentiary record.

Background

Hazen Paper is a small, privately held company owned by two cousins in Holyoke, Massachusetts. Robert Hazen is the Company's President, Thomas Hazen its Treasurer. (J.A. 48, 144; III R.A. 816-17.) Hazen Paper is what is known as a paper converter, and is engaged in the business of manufacturing coated, foil laminated and printed paper and paperboard for use in such products as cosmetic wrap, lottery tickets and pressure sensitive materials. (III R.A. 659-64.) An accountant retained by Respondent estimated the Company's pre-trial book value at just over \$8 million. (II R.A. 579.)

Hazen Paper hired Biggins in 1977. Biggins was 52 years of age at the time. (J.A. 47; II R.A. 417.) Biggins had no written contract of employment, but served the Company in the position of Technical Director until June, 1986. (J.A. 47, 88; IV R.A. 917.) Biggins' principal duties as Technical Director were to ensure that Hazen Paper satisfied the technical requirements for production of the various products manufactured by the Company. Specifically included in Biggins' formal job description were, among other responsibilities, the following:

⁸ The National Association of Manufacturers and Associated Industries of Massachusetts filed a joint brief as *amici curiae* in support of this petition.

⁹ The following statement of facts accepts the plaintiff's evidence below as true, and supplements such evidence with those portions of the defendants' testimony that were neither impeached nor substantively contradicted at trial.

- "Working with Management Sales, Customers and Vendors [to] develop new or revised products to fill more completely existing customer needs or to fill new requirements. This may be as simple as matching a new color or as complex as using new materials on new equipment to make an entirely new product";
- "Working with Production Manager and Plant Superintendent, aggressively seek[ing] means to improve existing production methods and processes with particular emphasis on chemical aspects of these improvements";
- Maintaining company compliance with state and federal regulations in the area of pollution control;
- Development and implementation of plant safety rules, processes and procedures for the safe handling of chemicals at Hazen Paper; and
- Service on Hazen Paper's five-member Executive Committee.¹⁰

(J.A. 47; II R.A. 417-19; V R.A. 1132.)

Biggins acknowledged that part of his job at Hazen Paper was "product development", and that at some point during his employment he became involved in developing paper coatings and inks at the Company. (J.A. 51-52.) In particular, Biggins testified that he pioneered the development of a new water-based coating, designed to eliminate hazardous emissions from the nitrocellulose and vinyl coatings generally used in the paper industry. (J.A. 52-53.) Through a series of testing procedures carried out in the early 1980's, Biggins succeeded in developing a water-based paper coating that both exceeded the requirements of applicable environmental laws, and constituted a superior product for ultimate customers in terms of gloss and durability. (J.A. 54-59.)

Thomas Hazen became aware of Biggins' work in developing a water-based paper coating (J.A. 54), and Biggins presented

¹⁰ The Executive Committee is the body at Hazen Paper charged with responsibility for the Company's major policymaking. (J.A. 144.)

Mr. Hazen with the product sometime in March of 1980. (J.A. 59.) In the spring of 1980, Hazen Paper began to use the water-based coating on some of its products; and by the mid-1980's, the coating — referred to by Respondent throughout the trial as the "Biggins Acrylic" — enjoyed wide application in the Company's manufacturing. (J.A. 60-61.)

In the period that followed Biggins' development of the water-based coating, Hazen Paper product sales increased substantially. (J.A. 63-67, 167.) Biggins acknowledged that, after developing and marketing the water-based acrylic for Hazen Paper, and while still employed by Hazen Paper, he personally received offers from vendors looking to distribute the product overseas. Biggins, however, responded by stating that "it was completely unethical and [he] wouldn't do it." (J.A. 68.)

The Hazens' Alleged Promise of Company Stock

In 1983, Biggins' salary at Hazen Paper was approximately \$30,000 per year, exclusive of bonus. Respondent, however, testified that he was extremely unhappy with this level of compensation. Biggins stated that as a member of the Executive Committee, he had access to the Company's profitability figures and salary data; that he was aware that an independent sales representative named Robert Hutchinson was earning "hundreds of thousands of dollars" selling the very product he had developed; and that, as a result, he "became annoyed".¹¹ (J.A. 71-72.) At trial, Mr. Hutchinson confirmed that Biggins complained to him about his salary level (J.A. 127-28), and Robert Hazen likewise testified without contradiction that Biggins "talked about how underpaid he was very, very often." (J.A. 134.)¹²

¹¹ Mr. Hutchinson was an independent sales representative, absorbed his own business expenses, and was paid on a commission basis rather than as an employee of Hazen Paper. Mr. Hutchinson was also several years older than Respondent." (J.A. 117-20.)

¹² Another Hazen Paper employee, Gail Calvanese, similarly testified that Respondent complained "many times" that salesmen such as Mr. Hutchinson "were making money off his coating." (III R.A. 741-42.)

Sometime in 1983, and as a result of his stated dissatisfaction with his compensation, Biggins arranged a meeting with Thomas and Robert Hazen. During this meeting, Biggins stressed the contributions he had made to the Company's business (including development of the water-based acrylic), compared his salary with Robert Hutchinson's, and was at that time given a 10% salary increase. (J.A. 71-72, 100.)

In 1984, Respondent received another 8% salary increase, but was again dissatisfied with his level of compensation. Biggins testified that he objected to the fact that a salesman such as Mr. Hutchinson was increasing his earnings at a more rapid rate than he, and resolved that he would confront Thomas Hazen with his grievance. (J.A. 72.) Accordingly, in July, 1984, Biggins approached Mr. Hazen and stated that he "wanted to discuss something that was bothering [him] greatly." Biggins then proceeded to complain to Mr. Hazen that he "had to keep begging for money and getting measly increases, while Mr. Hutchinson's commissions were rising dramatically." Biggins further stated that "[he] thought [he] was worth a hundred thousand dollars minimum." (J.A. 72-73, 100.)

Thomas Hazen replied to Respondent's complaint by informing Biggins that he could not give him such a large salary increase, as no one at the Company — including himself and Robert Hazen — earned that level of compensation. (J.A. 73.) According to Respondent, however, Thomas Hazen did state that "he would be willing to give [him] a piece of the Company in stock", in an amount sufficient to make up the difference between his \$44,000 per year salary and the \$100,000 compensation Biggins believed he deserved. (J.A. 73, 101.) According to Respondent's testimony, Mr. Hazen also stated that "he would have to talk with his accountants and his lawyers and work out a plan," and further cautioned that Biggins would in turn be required to sign over to Hazen Paper any rights he might claim in the water-based coating. (J.A. 73, 102.)

At trial, Thomas Hazen clarified the context of Respondent's ambiguous reference to a plan to be worked out by Company

lawyers and accountants. Mr. Hazen testified that he had informed Biggins during their mid-year meeting that Hazen Paper was considering implementation of a stock appreciation rights or phantom stock option plan for a limited number of key employees, but that the plan was still in the discussion stages with the Company's accountants and attorneys. (J.A. 145-46, 162.)¹³ Respondent did not contradict this amplification of Mr. Hazen's remarks during rebuttal testimony.

Approximately one year passed before Biggins reminded Thomas Hazen about the purportedly promised stock, at which time Mr. Hazen responded that "he was having some legal problems with it and it was in the hands of the lawyers." (J.A. 74, 102-03.) Thereafter, in December, 1985, Thomas Hazen congratulated Biggins on his achievement in developing another product that was to prove lucrative for the Company. In response, Biggins stated, "Thank you much for the compliment, where's my stock[?] I'm getting impatient. You promised me that in 1984, and I still haven't seen it. Don't give me congratulations, give me part of the company." To this, Mr. Hazen simply replied, "Oh, I got to take that down and dust it off." There was no evidence of any further discussion between Biggins and the Hazens about allegedly promised stock prior to their meeting of May 24, 1986 concerning a proposed confidentiality agreement. (J.A. 76-77, 103-04.)

By 1985, Biggins was the fourth highest paid employee at the Company — trailing only the Company's two owners (Thomas and Robert Hazen), and an older, 20-year employee by the name of Malcolm Gezner. (J.A. 134.) Nevertheless, Biggins made frequent requests for more money, and Robert Hazen grew impatient with him as a result. (J.A. 135.) Following the December, 1985 conversation with Thomas Hazen in which Biggins renewed his demand for Hazen Paper stock, Respondent testified that he "noticed a distinct change in their

¹³ Robert Hazen likewise testified that he and his cousin Thomas discussed the possibility of setting up a stock appreciation rights plan for employees, but that he was personally opposed to the idea. (IV R.A. 872-73, 884-86.)

[Thomas and Robert Hazen's] attitude towards [him]." Biggins testified that, following their confrontation concerning the stock issue, he and Robert Hazen ceased sitting together when they travelled by airplane on business, and that he and Thomas Hazen suddenly discontinued their practice of having weekly meetings. (J.A. 77-78.)

Respondent's Undisclosed Business Dealings With Company Competitors

In 1983, Respondent established his son Timothy in a business called "Proclamation, Inc." Proclamation was a company engaged in the business of cleaning up hazardous wastes and recovering dirty solvents generated by automobile shops and paper companies. Although Hazen Paper was not commercially engaged in such a business, Biggins testified that he personally performed similar services for the Company in his capacity as Technical Director. (J.A. 94-95, 110-11.)

The undisputed evidence at trial established that Biggins affirmatively sought to keep Proclamation's business confidential, and not to disclose it to the Hazens. At the time Biggins founded Proclamation, he confided to an independent sales representative about the business and specifically instructed him to "keep it in confidence." (J.A. 121.) Likewise, Thomas Hazen testified — *without contradiction* — that while Respondent had informed him prior to 1986 that he would be setting his son up in a business to dispose of waste materials from small auto body shops and garages, Biggins had assured him that neither he nor his son would be doing work for Hazen Paper competitors. Thomas Hazen explicitly voiced his objection to Biggins using expertise he had developed at Hazen Paper for the benefit of competitors, and expressed the view to Respondent that such activity would be "totally inappropriate." (J.A. 146-47.) Robert Hazen similarly testified that Biggins had given assurances that Proclamation would not be doing business with Hazen Paper competitors. (J.A. 135-36.) Significantly, while Biggins testified that he had informed Thomas Hazen about

Proclamation when he started the venture and that Mr. Hazen had voiced no objection (J.A. 80, 95), Respondent nonetheless conceded that he *never* told Mr. Hazen that Proclamation would be performing services for Hazen Paper competitors. (J.A. 113.)

Having advised the Hazens that Proclamation would perform no work for Company competitors, and having instructed another individual to keep his involvement with the venture in confidence, Respondent acknowledged at trial that Proclamation did, in fact, engage in work for competitors of his employer. (J.A. 96, 110-11.) Biggins testified, for example, that he personally facilitated a lunchtime introduction where his son made a sales proposal to a Hazen Paper competitor. (J.A. 110-12.) Respondent additionally testified that he transmitted letters over his own signature to Hazen Paper competitors, for the purpose of soliciting business on behalf of Proclamation. (J.A. 113-14.)¹⁴

Sometime after the summer of 1985, Biggins started up a new consulting business in the environmental/regulatory compliance area. Respondent's testimony was that he told Thomas Hazen of the "existence" of this venture in 1985, and that he was attempting to help his son Timothy. (J.A. 79-80, 97.) Thomas Hazen's uncontradicted testimony was that when he asked Biggins if he were personally involved with the consulting firm, Biggins stated "Oh, no, it's my son's business." (J.A. 149.) Asked at trial if he ever informed Mr. Hazen that the consulting business he had supposedly started for his son would be working with Hazen Paper competitors, again Respondent testified that he had not. (J.A. 113.)¹⁵

The undisputed evidence presented to the jury thus made plain that Biggins never informed the Hazens that he was per-

¹⁴ Respondent's admissions in this regard were further confirmed by testimony from certain Hazen Paper competitors themselves. *See, e.g.*, testimony of Roger Sullivan (J.A. 128-29) (describing Proclamation service proposal made by Biggins during 1984 meeting).

¹⁵ Revealingly, and in response to a question from the trial judge, Respondent testified that he understood that he could not properly "work for anyone else on the outside" while he was employed at Hazen Paper. (J.A. 83.)

sonally going to be working on behalf of an outside venture, or that such venture would be doing business with Company competitors. In point of fact, however, the company established by plaintiff was named "W.F. Biggins Associates, Inc.", and was set up to provide small and medium-size businesses with the same kinds of environmental advisory services on a consulting basis that Biggins himself had been providing to Hazen Paper as Technical Director. (J.A. 96-97, 105-07.)

At the time he organized W.F. Biggins Associates, Respondent and his son Timothy prepared a brochure to use in connection with firm marketing. Emphasizing the important role of Biggins in the new company's business, the brochure identified the firm as "W.F. Biggins Associates, Inc.", and nowhere even made reference to Respondent's son Timothy. (J.A. 104-05, 183-84; III R.A. 696.) Likewise, in a Dun & Bradstreet report prepared for W.F. Biggins Associates, the company listed Respondent alone as its founder, chief executive officer and director. Timothy Biggins' name appeared nowhere in the report. (J.A. 105, 185-87; III R.A. 696.) Finally, and again contrary to Respondent's representations to the Hazens, the evidence at trial showed that W.F. Biggins Associates was, indeed, performing services for Hazen Paper competitors, and that Biggins was himself *personally* involved in soliciting business from these competitors on behalf of W.F. Biggins Associates. (J.A. 98, 107-09, 128-29, 137-38, 150-51; IV R.A. *passim*.)

The first time that Thomas or Robert Hazen had any idea that Biggins was, contrary to his prior assurances, marketing consulting services with his son to competitors through "W.F. Biggins Associates" was in late April, 1986, when an independent contractor named Donald MacMeekin showed Thomas Hazen the W.F. Biggins Associates brochure he had received. (J.A. 148, 163.) The Hazens confirmed Biggins' personal involvement in the consulting venture sometime toward the middle of May, 1986, after having a lengthy telephone conversation with Roger Sullivan — one of the very Hazen Paper competitors whom Biggins had solicited. (J.A. 130-31, 150-51.)

Both Thomas and Robert Hazen testified that they were taken aback by this discovery, that they were embarrassed by it, and that they felt betrayed. (J.A. 136-39, 148.)

Respondent's Discharge From Employment

The Hazens' discovery of Respondent's outside consulting activities on behalf of competitors led them to confront Biggins directly. Shortly after being shown the brochure for W.F. Biggins Associates, Thomas Hazen met with Biggins in his office. At this meeting, Mr. Hazen told Biggins that he was aware that W.F. Biggins Associates was *his* business rather than his son's, and that the apparent conflict of interest was "totally unsatisfactory." (J.A. 148.) Mr. Hazen further stated that he was going to continue investigating the matter, and would then decide what the Company would do. (J.A. 151.)

On May 24, 1986, Thomas and Robert Hazen met with Biggins to discuss a resolution of their dispute. At this meeting, the Hazens presented Biggins with evidence that he was marketing services to competitors at the expense of Hazen Paper, and informed him that it had to stop: "You can't be working for our competitors and working for the Hazen Paper Company at the same time." (J.A. 138-39.) The Hazens stated, in no uncertain terms, that they found Biggins' conduct "outrageous," and informed Respondent that he would have to sign a confidentiality agreement if he wanted to remain in their employ. (J.A. 151-52.) Respondent testified to these facts as well. (J.A. 78-79.)

The Hazens indicated to Biggins at their meeting of May 24 that they would draw up an employment contract of some type. Shortly thereafter, on June 3, 1986, Thomas and Robert Hazen provided Biggins with a proposed Employee Confidentiality Agreement. Accompanying the Agreement was a cover memorandum that stated as follows:

"Per our discussion, please review and sign the attached agreement. We'd like to have this back by or before June 9.

We cannot tolerate the kind of outside activity in areas directly relating to the business of Hazen Paper Company that you have been involved in for several years. We regard it as unethical and completely unacceptable. We trust that the agreement attached spells out clearly what we expect and that you will abide by it completely while carrying out the regular duties and responsibilities of the job of Technical Director.

With respect to the practical matter of disassociating from your consulting firm, we expect you to accomplish this by September 1. Specifically, we expect you to change the name of the firm, relinquish your ownership and control of the firm, and remove yourself from any duties of or responsibilities to the firm."

(J.A. 80-81, 139, 168-71.)

Respondent acknowledged that signing the proffered Employee Confidentiality Agreement was an express condition of his continued employment at Hazen Paper. (J.A. 81.) The draft agreement given to Biggins on June 3, 1986 included the following six restrictions:

- Biggins was required to report all discoveries and inventions made by Biggins during the course and within the scope of his employment at Hazen Paper, whereupon such discoveries and inventions would become the exclusive property of the Company;
- Biggins covenanted to protect all Hazen Paper trade secrets and confidential information, and not to use or disclose such information in any capacity without express written authorization from Hazen Paper;
- Biggins agreed to execute any documents that Hazen Paper might deem necessary to protect the Company's interest in its discoveries and inventions;
- Biggins agreed to disclose all patent applications and copyrightable material not subject to the Employee Confidentiality Agreement;

- Biggins covenanted "to devote his full time and best efforts to the business of the company and agree[d] not to take any other job either as an employee or a consultant of another business during the time of his employment with Hazen without Hazen's prior written permission." In this regard, the Agreement further provided that "[p]ermission will not be granted if Hazen, in its sole discretion, determines that such other employment creates a conflict or potential conflict of interest with Hazen's present or future business"; and finally,
- Biggins covenanted that he would not engage in a business that competed with Hazen Paper for a period of two years following the termination of his employment at the Company. (J.A. 83, 169-71; V R.A. 1138.)

On June 10, 1986, after reviewing the matter with his personal attorney, Biggins met with Thomas Hazen to discuss the Employee Confidentiality Agreement. At this meeting, Biggins informed Mr. Hazen that he had "no problem" with the Agreement as drafted, but that he would only sign it if it were accompanied by a "companion agreement" defining his rights to salary and Company stock. Mr. Hazen responded by stating that he would not accede to any additional agreements, and that if Biggins did not sign an employee confidentiality agreement the parties would have to sever their relationship. (J.A. 86-87.)

Thereafter, Biggins gave no indication to Thomas Hazen that he was willing to sign the confidentiality agreement as tendered, and indeed seemed more interested in going into the consulting business with his son. Accordingly, Mr. Hazen telephoned Biggins and offered him — in lieu of terminating his relationship with Hazen Paper altogether — the option of working for the Company as an outside consultant. Specifically, Mr. Hazen:

"suggested that [they] try and work out a separation agreement, *which would cover things like his pension rights; perhaps a pay plan for a temporary basis to ease him through, and other benefits*, and would have dealt with things like the unemployment insurance, that we would work out such a separation agreement. *And that we also would work out some kind of a deal where he could do this kind of consulting for us.*

We could have used him on a retainer basis. Would have gotten him out of a highly confidential area for us; at the same time it seemed it would be in the interest of both parties to work out an amicable arrangement."

(J.A. 153-54)(emphasis added).

At the time Thomas Hazen made the foregoing offer to Biggins, various other persons performed services for the Company as independent contractors rather than as employees, including the Company's attorneys. Although Respondent claimed below that Mr. Hazen's proposed consulting arrangement meant that he would no longer be a Hazen Paper employee, Biggins had in fact never expressed any interest in such an arrangement. Accordingly, the parties did not discuss what effect, if any, the proposed consultancy would have on Biggins' pension and other benefits. (J.A. 87-88, 160-61.) Again, however, Mr. Hazen testified without contradiction or impeachment that he suggested to Biggins that they forge a separation agreement that would cover Biggins' pension and related benefits, but that Biggins was not interested in pursuing such an option. (J.A. 153-54.)

On June 13, 1986, Thomas Hazen met with Biggins at Hazen Paper. At this meeting, Biggins reiterated that he would be willing to sign the Employee Confidentiality Agreement, but that he "had to have the financial agreement as well." Mr. Hazen replied that there would be no such changes to the Agreement, and that if Biggins refused to sign it his employment would be terminated. (J.A. 87-88.) When Biggins refused to sign the Employee Confidentiality Agreement, Mr. Hazen requested him to leave the building and his employment was terminated. (J.A. 88.)

The Alleged Evidence of Age Discrimination

Respondent's affirmative evidence of age discrimination was, as the District Court correctly observed, "thin" to say the very least. During the entire course of his trial testimony — in which Biggins described close to ten years of employment at Hazen Paper — Respondent referred to just two isolated remarks purportedly made by Thomas and Robert Hazen that in any way concerned his age. According to Biggins, Thomas Hazen once stated, at some indeterminate time after he had provided members of the Executive Committee with life insurance policies, that "it was costing him a lot more for [Biggins'] policy because [he] was so old." (J.A. 99.) In addition, Respondent testified that, sometime in 1985, Robert Hazen joked that Biggins' Company-sponsored membership in a handball court in Holyoke "wouldn't do [him and fellow executive Malcolm Gezner] much good because [they] were so old." (J.A. 99.)

Beyond the above evidentiary fragments, Respondent presented no affirmative evidence of age bias that was in any way probative of his ADEA claim. Biggins introduced no additional evidence of age-biased remarks by anyone at Hazen Paper, nor did he proffer statistical evidence of any kind suggesting age discrimination in Hazen Paper's employment practices. Likewise, Respondent made no demonstration of the existence of discriminatory corporate policies at Hazen Paper; nor did Biggins present evidence of any invidious pattern of age-related discharges or forced early retirements at the Company.

Excepting the two isolated quips which referred to age, the courts below rested their finding of discrimination entirely on evidence suggesting an intent by the Hazens to prevent Biggins' pension rights from vesting. In this regard, Respondent introduced evidence establishing that Thomas Hazen was the Company executive responsible for administering Hazen Paper's retirement plan (J.A. 156); that Mr. Hazen received pension account documents describing the pension status of individual employees (J.A. 157); and that, at the time of his discharge, Biggins was eight months shy of the pension plan's

ten-year vesting requirement. (J.A. 115, 157.)¹⁶ Respondent, however, presented no evidence — beyond the implication that Thomas Hazen had knowledge that Biggins' discharge would cause him to lose pension benefits — that would suggest the Hazens were specifically motivated to interfere with Biggins' pension vesting. More critically, the undisputed evidence at trial was that employees at Hazen Paper vest in the Company's pension plan after ten full years of credited service, and that (with an exception for those who reach their normal retirement date) an employee's age is of *no* consequence to this vesting schedule. (J.A. 156-58, 182.)

SUMMARY OF ARGUMENT

This is a case where the double-damage remedy for a "willful" violation of the ADEA is wholly unjustified, and the Court below erred in the legal standard it applied to reinstate such punitive damages. Indeed, even predicate ADEA liability is without proper basis, depending as it does upon an inference both legally and logically insupportable, *i.e.*, that an intention to prevent an employee's pension vesting is, without more, evidence of age discrimination. On the basis of manifestly mistaken views of the law, double liability was imposed against Petitioners where there should have been none at all.¹⁷

There was no probative evidence permitting the jury to find an ADEA violation in this case. Beyond the mere suggestion that Petitioners knew Biggins' pension benefits would vest in a period of months, there was no evidence that the Hazens in fact discharged Biggins for the specific purpose of depriving him of those benefits. Even if there were such evidence, however, in-

¹⁶For his part, Thomas Hazen testified that he relied heavily upon an outside consulting firm to attend to administration of the Company's pension plan, and further indicated that in 1986 he was not even aware of the plan's particular vesting schedule. (J.A. 156-57, 163-64.)

¹⁷As a matter of orderly presentation, and because it illuminates Petitioners' position concerning liquidated damages, this Brief will first argue that predicate liability against the Hazens rests upon an illegitimate legal and evidentiary foundation, and will then address the erroneous standard applied by the Court of Appeals to award double damages.

terference with an employee's service-based pension vesting does not itself constitute a violation of the ADEA.

Denial of pension benefits is not logically equivalent to discrimination on the basis of age. Where, as here, an employer's pension plan provides that benefits will vest after ten years of service, employees both within and outside the protected class are equally eligible for vesting. Only the happenstance that Biggins was originally hired at the age of 52, a fact tending to negate an inference of age discrimination, resulted in his pension vesting at the more advanced age of 62. Thus, on the facts of this case, it was error for the Court of Appeals to equate interference with Biggins' pension vesting with age discrimination.

The ADEA's language, legislative history and overall structure confirm that Congress intended the statute to reach employment decisions affected by general age bias and prejudice, not to govern broader categories of personnel decisionmaking that might involve age "surrogates" such as seniority or pension status. Moreover, interference with employee pension rights is explicitly prohibited by ERISA, a statute enacted after the ADEA. Construing the ADEA to extend to pension interference permits circumvention of the enforcement scheme Congress incorporated in ERISA, a result contrary to both clear Congressional intent and prior decisions of this Court.

Even if the evidence somehow allowed for a predicate finding of age discrimination, the record will not support an inference that the Hazens' violation of ADEA was "willful" within the meaning of Section 7(b) of the Act. The District Court's entry of judgment notwithstanding the verdict on the award of liquidated damages was thus clearly correct.

As this Court recognized in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), Congress intended liquidated damages to be "punitive in nature" and available only in a limited number of cases. To achieve this purpose in an individual discriminatory treatment case such as the present one, a plaintiff must show *both* that the employer knew or showed reckless disregard for whether its conduct violated the ADEA, and further that the employer's actions were repeated, were without

colorable justification, or were otherwise oppressive or outrageous in character. To apply the less rigorous standard of willfulness adopted by the Court of Appeals below would lead to liquidated damages being awarded in virtually every discriminatory treatment case, a result contrary to the explicit Congressional intent identified by this Court in *Thurston*.

In the instant case, there was no probative evidence that Petitioners committed any violation of the ADEA at all, much less that their violation was "willful" within the meaning of Section 7(b). The Hazens simply required Biggins to sign a confidentiality/non-competition agreement after discovering that he had been marketing business services to Company competitors. When Biggins refused to sign the agreement without a guarantee of additional compensation, he was discharged from employment. Such conduct by the Hazens was neither harsh, outrageous nor otherwise without colorable justification. Further, even if the evidence permitted the inference that Biggins' discharge was motivated by a desire to defeat his pension vesting, there was no basis in the record for finding that Petitioners knew or showed reckless disregard for whether such conduct violated the ADEA. For these reasons, and irrespective of whether or not the facts adduced at trial can sustain a finding of predicate ADEA liability, the evidence is legally insufficient to meet the higher threshold required to establish a "willful" violation of the statute.

ARGUMENT

Petitioners in this case are entitled to judgment as a matter of law. The evidence at trial — when viewed in the light most favorable to Respondent — permits no reasonable inference that the Hazens committed either an ordinary or willful violation of the ADEA.

I. The Jury's ADEA Verdict Is Unsupported By The Evidence And Erroneous As A Matter Of Law

The ADEA provides that it shall be unlawful for an employer to discharge or otherwise discriminate against an employee "be-

cause of . . . age." 29 U.S.C. § 623(a). To prove discrimination because of age, a plaintiff must introduce evidence from which a reasonable jury could conclude, in light of common experience, that it was more likely than not that the employer's adverse action was motivated by consideration of the plaintiff's age. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80 (1978) (showing violation of Title VII of Civil Rights Act of 1964 requires "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations"); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff") (quotations omitted); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (plaintiff's burden under Title VII is to demonstrate that defendant's proffered explanation for an adverse employment action is more likely than not a pretext for discrimination).¹⁸ In this case, the evidence presented at trial permits no rational inference that Biggins was more likely than not discharged from employment because of intentional discrimination based on age.

A. The Finding That Petitioners Discharged Biggins In Order To Defeat His Pension Vesting Is Both Unsupported By The Evidence And Immaterial To Respondent's Claim of Age Discrimination

The linchpin of the Court of Appeals' analysis in upholding age discrimination liability against Petitioners was its assertion

¹⁸ Congress designed the ADEA's discrimination prohibitions to parallel those found in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Accordingly, principles of construction under Title VII are routinely applied in ADEA cases. See *Oscar Meyer Co. v. Evans*, 441 U.S. 750, 755-58 (1979) (noting that, where provisions of ADEA are virtually in *haec verba* with Title VII, construction of ADEA in accordance with interpretations under Title VII serves Congressional intent). See generally 3A Larson, *Employment Discrimination* § 102.41 (1992).

that the jury could properly have concluded the Hazens were motivated by a desire to defeat Biggins' pension vesting — and that the imposition of a confidentiality agreement was simply a pretextual means to that end. The First Circuit reasoned that "age was inextricably intertwined with the decision to fire Biggins," because "[i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." See Cert. Pet. A-14.¹⁹ This conclusion rests not only upon an inadequate evidentiary foundation, but as well upon a logical error that is fatal to its reasoning.

1. The Evidence Permits No Reasonable Inference That The Hazens Dismissed Biggins From Employment In Order To Prevent His Pension Rights From Vesting

Against the overwhelming weight of evidence that Petitioners discharged Respondent from employment because of his refusal to sign a confidentiality agreement, tendered to him immediately following the Hazens' discovery that Biggins had been soliciting Company competitors on behalf of an outside business venture, the District Court and First Circuit held the jury could have found this reason to be a pretext masking an intent to interfere with Biggins' pension vesting. This inference, however, is completely unsupported by the evidence of record.

The only evidence at trial that in any way concerned Respondent's pension rights was the suggestion that Thomas Hazen arguably had knowledge at the time he terminated Biggins' employment that Respondent was eight months shy of satisfying the pension plan's ten-year vesting requirement. See Cert. Pet.

¹⁹ The District Court placed similar emphasis on this inference as a basis for ADEA liability, observing that "the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights." See Cert. Pet. A-56.

A-55 – A-56, A-63 – A-64.²⁰ This evidence is insufficient to bear the weight of Respondent's claim. Even if the jury could conceivably have found that Thomas Hazen was *aware* of Respondent's pension status at the time he discharged Biggins from employment, such knowledge cannot, standing alone, give rise to a proper inference that Mr. Hazen was *motivated* by that knowledge in his decisions concerning Biggins.

In *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991) (*en banc*), the Seventh Circuit (Posner, J.) affirmed summary judgment in favor of the employer in an ADEA case for precisely this reason. In so ruling, the court stated:

"It is true that as chief executive officer and a former trustee of the pension fund Packer almost certainly knew that Visser was near to full vesting; and so we shall assume. *But a trier of fact may not infer action from knowledge alone. Otherwise every worker who lost his job within months, or perhaps years, before the full vesting of his pension would have a prima facie case of age discrimination.* Visser's age, the fact that he incurred a loss of pension benefits when he was fired, the fact that he was replaced by a much younger man, the fact that he may have been fired for an unethical reason unrelated to his age — none of these facts is evidence of age discrimination. The first three merely place Visser within the protected class and establish injury, and the last is evidence *against* age discrimi-

²⁰ As noted *supra*, however, Mr. Hazen testified without contradiction that he relied heavily upon an outside consulting firm to handle the administrative details of the Company's pension, and even indicated that he was *not* in fact aware of the plan's ten-year vesting schedule when he discharged Biggins from employment in 1986. Indeed, as the District Court itself pointed out, Mr. Hazen appeared to be under the impression that Biggins had *already* achieved full vesting under the plan, see Cert. Pet. A-63 n.4, a fact that obviously belies an intent on his part to interfere with Respondent's pension rights. More critically, on appeal to the First Circuit, Respondent *himself* took the position that he was in fact already vested in the Company pension at the time of his dismissal from Hazen Paper. See Brief of Plaintiff-Appellee/Cross-Appellant Walter F. Biggins, at p. 16 ("In fact, at trial it became apparent that, despite the defendants' position, Biggins really had been vested all along because of a bonus year's credit that was given to employees after five years of service").

nation. The only evidence of age discrimination is — what we have just said is not enough — Packer's knowledge of Visser's age and pension rights."

Visser, 924 F.2d at 658-59 (emphasis added).

It is plain from the unassailable logic of *Visser* that, even assuming Thomas Hazen had actual knowledge of Respondent's pension status at the time he presented him with the proposed confidentiality agreement, such knowledge cannot by itself sustain an inference that Mr. Hazen proposed the agreement in order to deprive Biggins of his pension rights. This is particularly true in light of the strong evidence of record showing that the timing of Thomas Hazen's action was precipitated not by Biggins' impending pension eligibility, but by Mr. Hazen's discovery of Respondent's distribution of brochures to competitors advertising the services of W.F. Biggins Associates.²¹

Apparently recognizing this defect in its analysis, the District Court noted that further evidence of age discrimination could be found in Mr. Hazen's offer of a consultancy arrangement to Respondent as an alternative to signing the confidentiality agreement. From this the District Court reasoned, and the First Circuit apparently accepted, that the true motive for Mr. Hazen's actions was to cut off Biggins' pension rights, and not to persuade him to sign the confidentiality agreement. Such reasoning, however, cannot withstand scrutiny.

First, there was no evidence that Respondent would be performing the same duties — or have the same access to confidential information — under the proposed consultancy arrangement as he had enjoyed as Technical Director.²² Furthermore,

²¹ The principle that knowledge of an employee's pension status at the time of a discharge decision will not, without more, permit an inference that the discharge was motivated by a desire to defeat pension vesting finds additional support in settled judicial interpretations of Section 510 of ERISA, 29 U.S.C. § 1140. See *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 389-90 (2d Cir. 1990); *Corum v. Farm Credit Services*, 628 F. Supp. 707, 717 (D. Minn. 1986); *Donohue v. Custom Management Corp.*, 634 F. Supp. 1190, 1197 (W.D. Pa. 1986).

²² Indeed, Thomas Hazen testified that his objective was to work out an amicable separation arrangement that would have removed Biggins from a

there was no evidence that the consultancy being suggested by Thomas Hazen would have eliminated Respondent's pension rights. To the contrary, Mr. Hazen testified specifically and without contradiction that any agreement with Respondent would have provided for his pension benefits, and that he had so informed Biggins. While Biggins introduced evidence that the Company employed certain other outside parties as independent contractors (*e.g.*, its lawyers) without granting them pension benefits, he did not — and could not — say that the arrangement being proposed for him would not have included such benefits. Biggins and Mr. Hazen simply never discussed the matter one way or the other. Hence, there was no basis — short of abject speculation and conjecture — for the jury to conclude that the proffered consultancy somehow suggested an attempt by the Hazens to deprive Biggins of his pension. See *Galloway v. United States*, 319 U.S. 372, 395 (1943) (when evaluating sufficiency of the evidence for directed verdict purposes, "mere speculation [is] not allowed to do duty for probative facts"); *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 255 (1st Cir. 1986) ("plaintiff cannot make inferences from facts which do not appear in the record").

2. Interference With Pension Vesting Does Not Constitute Age Discrimination

Even if the evidence allowed for the conclusion drawn by the courts below, *viz.*, that Petitioners were motivated in their actions toward Biggins by a desire to prevent his vesting in the Hazen Paper pension, such an inference provides no basis for ADEA liability as a matter of law. The First Circuit effectively equated age and pension status by assuming that "age was inextricably intertwined with the decision to fire Biggins," because

highly confidential area at Hazen Paper, while allowing both Biggins and the Company to continue meeting their respective employment needs. (J.A. 153-54.) It also bears noting that retention of Biggins as an outside consultant would likewise have removed Biggins from his position on the Hazen Paper Executive Committee — the Company's highest level of policymaking authority.

"[i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." See Cert. Pet. A-14. From this unsubstantiated assumption, the Court of Appeals held that a decision to discharge Biggins intended to thwart pension vesting was tantamount to age discrimination. *Id.* Resting as it does upon a presumed connection between age and pension eligibility which — on the record of this case — does not exist, the First Circuit's reasoning is fundamentally flawed.

a. **There Is No Connection Between Service-Based Pension Status And Age**

The Court of Appeals' formulation that pension status is "inextricably intertwined" with age displays a serious deficit of analysis and proves too much. As set forth in the argument which follows, service-based pension vesting is a matter wholly independent of age. If the Court of Appeals is suggesting that an age discrimination claim is made out any time an older worker is discharged before his pension rights can vest, then the court is simply wrong. Such reasoning would create a species of tenure for employees over age 40 which was never envisioned by Congress. The undisputed evidence at trial was that employees at Hazen Paper vested in the Company's pension plan after ten full years of service. Thus, an employee hired at age 19 vested at age 29, an employee hired at age 29 vested at age 39, and so on. Only the pure *happenstance* of plaintiff's being hired at age 52 — ironically a fact tending to *negate* an inference of age discrimination²³ — resulted in his pension vesting at the more advanced age of 62. In these circumstances, it was manifest error for the Court of Appeals to equate an employment deci-

²³ See *Menard v. First Security Services Corp.*, 848 F.2d 281, 289 n.4 (1st Cir. 1988) ("We note that [plaintiff] when hired was already age 52, making it seem less likely that his discharge three years later was based on company prejudice against older people").

sion based on pension status with age discrimination; for the two have nothing to do with one another.²⁴

The First Circuit's ruling stands in conflict with a recent decision of the Seventh Circuit, where the court held that a discharge premised upon the employee's eligibility for service-related pension benefits (as distinct from benefits determined on the basis of age) did not violate the ADEA. See *Wheeldon v. Monon Corp.*, 946 F.2d 533 (7th Cir. 1992). In *Wheeldon*, the Seventh Circuit held that, in order to prevail on a claim that an employer's consideration of economic factors violated the ADEA, "the plaintiff must show that the economic factor relied upon by the employer operates as a proxy for age. Although pensions may be used as a proxy for age, we decline to rule that pension considerations always operate as such. Instead, the use of pensions as a proxy for age should be examined on a case-by-case basis." *Wheeldon*, 946 F.2d at 536 (footnote omitted) (rejecting correlation between pension status and age, and affirming summary judgment against ADEA claim).

The error of the First Circuit's substitution of pension interference as a proxy for age bias under the ADEA (and the wisdom of the Seventh Circuit's more discerning approach) has been further demonstrated by two recent district court decisions. In *Pickering v. USX Corp.*, 758 F. Supp. 1460 (D. Utah 1990), the court rejected the precise theory of age discrimination upon which the First Circuit premised liability against the Hazens:

²⁴ It is, of course, well settled that an employee discharge motivated by considerations other than age — even improper ones — cannot violate the ADEA. See, e.g., *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 658-59 (7th Cir. 1991) ("[Plaintiff's] age, the fact that he incurred a loss of pension benefits when he was fired, the fact that he was replaced by a much younger man, the fact that he may have been fired for an unethical reason unrelated to his age — none of these facts is evidence of age discrimination"); *Villanueva v. Wellesley College*, 930 F.2d 124, 128 (1st Cir.), cert. denied, 112 S. Ct. 181 (1991) ("Nondiscriminatory motive is immaterial to a discrimination case; therefore, the mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact") (affirming summary judgment).

"Plaintiff's protestations that age and pension eligibility are 'inexorably linked' are belied by the actual terms of the pension plan in this case. As is true of most pension plans, years of service — rather than age — is the primary factor in determining benefits eligibility. Absent some specific evidence of disparate treatment on the basis of age, the mere fact that older employees may have had more years of service than younger employees does not automatically convert the alleged pension benefits discrimination into age discrimination. A contrary holding would mean that virtually every discriminatory pension benefits denial in violation of ERISA section 510 would also constitute age discrimination. This court refuses to interpret the ADEA as a protection-broadening appendage to ERISA section 510. See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 109 S. Ct. 2854, 2867, 106 L. Ed.2d 134 (1989) (reasoning that the ADEA is not intended as an ERISA surrogate for protecting pension benefit rights)."

Pickering, 758 F. Supp. at 1462 (citation omitted). Accord *Harvey v. I.T.W., Inc.*, 672 F. Supp. 973, 975 (W.D. Ky. 1987) ("Even assuming *arguendo* the defendants terminated [plaintiff] to prevent his pension rights from fully vesting, this would not be probative of age discrimination since it goes to tenure with the company, not age. A young person who has been with the company for a long time may very well be closer to a fully vested pension than an older person who just started work there recently."). Cf. *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) ("Age and pension expense are correlated, though they are not the same thing. There is an analytical difference, certainly, between firing a person on the basis of a stereotyped view of older workers' energy, flexibility, initiative, and other employment attributes, and firing him to save money.") (dicta).²⁵

²⁵ But see *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (3d Cir. 1988) (discharge of employee motivated by desire to avoid increased benefits payable after 30 years' service violated the ADEA, because "such amounts are

b. **The ADEA Is Concerned With Discrimination On The Basis Of Age, Not With Personnel Decisionmaking Which Involves Age Surrogates Such As Seniority Or Pension Status**

In predicating ADEA liability on the Hazens' purported denial of non age-related pension benefits to Biggins, the First Circuit has plainly disregarded the intent of Congress. The ADEA's language, legislative history and overall structure — as implicitly recognized in the foregoing cases — reveal that Congress meant the statute to reach employment decisions affected by age-based bias and prejudice, *not* to prohibit broader categories of personnel decisionmaking which might involve age surrogates such as seniority or pension status.

The ADEA's overriding concern with age, by itself, is apparent in the statute's preamble, which provides that the purpose of the Act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." See ADEA Preamble, 29 U.S.C. § 621(b). See also 113 Cong. Rec. 34,740 (1967) (Congress enacted the ADEA to remedy the harms older workers suffer from pervasive employer misconceptions about the relationship of age to ability) (testimony of Representative Perkins). Age-focus is likewise evident in the ADEA's principal liability provision, which prohibits employment discrimination against any individual "because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis supplied). See also 29 C.F.R. § 860.103(c) (1991) ("The clear

inextricably linked to an employee's years of service to the company and, hence, to his age"). The Third Circuit's decision in *White*, however, even if defensible on its own terms, is readily distinguished from the case at bar. In *White*, the pension benefits at issue were payable after 30 years' service, by definition making them available *only* to older employees in the protected class. A ten-year pension vesting requirement, by contrast, may be satisfied by employees of *all* ages, thereby negating any intrinsic equivalence between benefits eligibility and advanced age.

purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.").

Nowhere do the terms of the ADEA evince any indication that the proscriptions of the statute were meant to extend beyond an employer's age-driven decisionmaking to reach personnel actions based on pension status or length of service. Indeed, key provisions of the Act and its legislative history belie such an intent. With respect to regulation of pension plans, the ADEA provides that "in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age" shall be unlawful. *See* 29 U.S.C. § 623(i)(1)(A).²⁶ In an attempt to foreclose the very type of logical error committed by the First Circuit, however, the ADEA further provides that the prohibition against age-based benefits distinctions does not

"prohibit an employer . . . from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan."

See 29 U.S.C. § 623(i)(2). The First Circuit's stated rationale for sustaining ADEA liability in this case, *i.e.*, that an intent to interfere with pension rights which vest on the basis of years of service is tantamount to age discrimination, is thus clearly in-

²⁶ It is clear that the ADEA does not in terms prohibit the denial of pension benefits for reasons *unrelated* to age. Such a proscription is contained in Section 510 of ERISA, 29 U.S.C. § 1140, which specifically prohibits employers from discharging employees for the purpose of interfering with their attainment of pension rights. *See, e.g., Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988).

compatible with the Congressional intent to exempt seniority-based benefits decisions from the statute's coverage.²⁷

c. **The Availability Of An ERISA Remedy For Pension Interference Militates Against Construing The ADEA To Reach Such Conduct**

That Congress did not intend the ADEA to be stretched to govern employer conduct interfering with non age-related pension vesting is further revealed in ERISA's explicit remedies for such conduct. *See* ERISA section 510, 88 Stat. 895, 29

²⁷ Numerous courts have, in contrast to the First Circuit, appropriately recognized the distinction between age and seniority level when applying the ADEA's liability provisions. *See, e.g., Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) ("[S]eniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. This is borne out, to be sure, by the simple observation that a 35-year old employee might have more seniority than a 55-year old employee"). *Accord, Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1087 (3d Cir. 1992) (ADEA does not protect employee from adverse employment decision based on seniority "if it cannot be demonstrated that chronological age was a factor"); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992) (same); *Christensen v. Equitable Life Assurance Soc'y*, 767 F.2d 340, 344 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (employee's loss of pension benefits not itself evidence of age discrimination: "In the absence of any showing that [defendant] has a policy of terminating older employees in order to save on pension payments, [plaintiffs] evidence fell far short of the substantial character needed to establish purposeful age discrimination"); *Finnegan v. Trans World Airlines, Inc.*, 767 F. Supp. 867 (N.D. Ill. 1991), *aff'd*, ____ F.2d ____, 1992 WL 161052 (7th Cir. July 14, 1992) (employer's cap on annual vacation accrual rate based on years of service provided no basis for ADEA liability, even though the limitation correlated with age); *Arnold v. United States Postal Service*, 649 F. Supp. 676, 683 (D.D.C. 1986) ("Discrimination on the basis of seniority . . . is not, on its face, discrimination on the basis of age. As plaintiffs admit, no court has expressly held that seniority is inherently related to age"). Indeed, prior to this case, even the First Circuit distinguished employment decisions based on age from those based on considerations arguably correlated with age. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health").

U.S.C. § 1140 (1974) (making it unlawful to discharge any person from employment "for the purpose of interfering with the attainment of any right to which such [person] may become entitled under [an employee pension plan]"). This Court has indicated its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA," *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), and has likewise suggested that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981).

This Court applied this principle on directly analogous facts in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, a plaintiff claiming race discrimination attempted to extend the coverage of section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (prohibiting discrimination in the "making and enforcement of contracts"), to reach on-the-job racial harassment clearly prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* After acknowledging that there was "some necessary overlap between Title VII and § 1981," the Court stated:

"We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. That egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII), moreover, should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct. . . . [T]he availability of the latter statute should deter us from a tortuous construction of the former statute to cover this type of claim."

Patterson, 491 U.S. at 181 (citations omitted).

Respondent here seeks to do precisely what this Court said was inappropriate in *Patterson* — namely, to stretch the coverage of an earlier statute (ADEA) to reach employer conduct that

is clearly proscribed by a later one (ERISA). This is wrong. Congress has in ERISA enacted a comprehensive remedial scheme intended to penalize employer attempts to frustrate employee benefit rights. Applying the foregoing principle of *Patterson*, there is no reason in law or logic for courts to engraft onto the ADEA a regulatory provision already spelled out in detail by ERISA — particularly in cases where, as here, the ERISA remedy was successfully invoked and obtained by the employee.²⁸

In sum, the decision of the Court of Appeals to allow pension status to serve as a stand-in for "age" when applying the ADEA contravenes the logic, language and legislative intent of the statute. At the same time, the First Circuit's decision to treat seniority-based pension eligibility as a proxy for age departs from the strong consensus of federal courts on this issue, and improperly broadens the ADEA to reach employer conduct already regulated under section 510 of ERISA. For these reasons, even if the evidence at trial permitted the inference that Petitioners discharged Biggins from employment in order to interfere with his pension vesting, such an inference still cannot properly serve as the basis for ADEA liability.

II. The District Court Properly Struck The Award Of Liquidated Damages Because There Was No Evidence That Petitioners' Violation Of The ADEA Was Willful Within The Meaning Of Section 7(b) Of The Act

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that liquidated or double damages shall be payable "only in cases of willful violations of [the Act]." Thus, in order to recover liquidated damages, a plaintiff must prove both that the Act has been violated and that the violation was "willful" within the meaning of Section 7(b).

²⁸ This conclusion finds further support in the remarks of the ADEA's primary legislative sponsor, who observed that "the age discrimination law should not be used as the place to fight the pension battle." See *Age Discrimination In Employment Act: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (testimony of Senator Javits).

In the present case, and for the reasons set forth *supra*, there was no probative evidence that Petitioners committed any violation of the ADEA at all. Even if there were such evidence, however, there was certainly no probative evidence that the violation was "willful" within the meaning of Section 7(b). For each of these reasons, the District Court's entry of judgment notwithstanding the verdict on Respondent's claim for liquidated damages was correct as a matter of law, and should be reinstated by this Court.

A. To Recover Liquidated Damages In A Discriminatory Treatment Case, Plaintiff Must Show Both That Defendant Knew Or Displayed Reckless Disregard That Its Conduct Violated The ADEA, And That Defendant's Actions Further Warrant The Imposition Of Punitive Sanctions

This Court has recognized that "willful" is a word of varying definition, and should be construed according to the context in which it is used. For example, in *Spies v. United States*, 317 U.S. 492, 497 (1943), the Court described "willful" as a word "of many meanings, its construction often being influenced by its context." More recently, in *United States v. Bishop*, 412 U.S. 346, 356 (1973), the Court stated that "[w]e continue to recognize that context is important in the quest for [willful's] meaning." See also *United States v. Murdock*, 290 U.S. 389, 394-395 (1933) (recognizing that "willful" can have many different meanings depending on the context in which it is used); Working Papers, *National Comm. on Reform Of Federal Criminal Laws*, 128 (1976) ("[t]here may be no word in the federal criminal lexicon which has caused as much confusion as the word 'willfully' (or 'willful')").

1. The Term "Willful" Must Be Construed Consistently With The Punitive Purpose of Liquidated Damages

In *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), this Court construed the term "willful" as used in Section 7(b)

of the ADEA in light of the structure and legislative history of the statute. The Court concluded that, since Congress plainly intended ADEA liquidated damages to be "punitive in nature" and available only in a limited number of cases,²⁹ the term "willful" should be interpreted to require, at a minimum, proof that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 128-29.³⁰

In reaching this result, the Court rejected the prior decisions of some circuits that a willful violation exists whenever an employer has committed age discrimination with an awareness of the ADEA and its potential applicability to the employment decision at hand. The Court reasoned that, because the ADEA requires employers to post notices informing employees of their rights under the Act, see 29 U.S.C. § 627, so broad a construction of willfulness would lead to "an award of double damages

²⁹ The ADEA's legislative history confirms that the liquidated damages remedy was punitive in purpose. See, e.g., 113 Cong. Rec. 7076 (1967) (testimony of Senator Javits). See generally, Charland, *Willfulness, Good Faith, and the Quagmire of Liquidated Damages Under the Age Discrimination in Employment Act*, 13 J. Corp. Law 573, 585-86 (1988) (reviewing legislative history of ADEA and concluding that "liquidated damages were meant to be punitive"). Even before *Thurston*, federal courts generally interpreted the willfulness requirement of Section 7(b) as a prescription for punitive damages. See, e.g., *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981) ("the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA"); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978) ("liquidated damages . . . effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve"); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 840 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978) ("If the employer's conduct has been such as to merit punitive treatment, then he is to be penalized by doubling the award").

³⁰ This Court has since reaffirmed the *Thurston* definition of willfulness in a case decided under the Fair Labor Standards Act, 29 U.S.C. § 216, the statute whose remedial provisions served as the model for ADEA Section 7(b). See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) ("The standard of willfulness that was adopted in *Thurston* — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act").

in almost every case" — a result at variance with Congress's clear intent to create a two-tiered liability scheme. *Thurston*, 469 U.S. at 128. The Court stated: "Both the legislative history and the structure of the statute show that Congress intended a two-tier liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent." *Id.* at 128.

2. The *Thurston* Test For Liquidated Damages Cannot Properly Be Applied To Individual Discriminatory Treatment Claims

Thurston, in contrast to this case, did not concern a claim of individual discriminatory treatment. Rather, like the typical disparate impact case, *Thurston* involved a company-wide plan or policy that adversely affected an older segment of the employer's work force. Since *Thurston*, federal courts have struggled to apply the "knew or showed reckless disregard" standard to cases involving individual discriminatory treatment claims.³¹ The difficulty arises because, in discriminatory treatment cases, a finding of predicate liability necessarily requires a finding of discriminatory intent. See *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (plaintiff bears the "ultimate burden of persuading the court that she has been the victim of intentional discrimination"); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (under ADEA, "the ultimate question is . . . whether it [employer's action] was unlawfully motivated"); *Cowen v. Standard Brands, Inc.*, 572 F.Supp. 1576, 1580 (N.D. Ala. 1983) ("In a disparate treatment case . . . [precedent] require[s] an ultimate showing of an intent

³¹ Discriminatory treatment cases involve claims that the employer acted against a particular employee because of his age, whereas disparate impact cases involve claims that the employer implemented a policy, neutral on its face, which fell more harshly on older employees. Proof of discriminatory motive is essential in discriminatory treatment actions, but is not required in disparate impact cases. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). See generally M. Player, *Employment Discrimination Law* 356, 809 (1988).

to discriminate, and that any articulated non-discriminatory reason necessarily is a pretext"). Accordingly, and as the District Court below recognized, see Cert. Pet. A-57 – A-59, a rigid application of *Thurston* to discriminatory treatment claims will inexorably lead to double damages in almost every case. See *Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1163 (6th Cir. 1991) ("The courts have had some difficulty in finding a definition of 'willfulness' that allows for the award of double damages where appropriate, but does not result in double damages being awarded as a matter of course whenever an employee is discharged or otherwise discriminated against because of his age. It is clear that Congress did not intend that double damages be awarded automatically whenever a violation of the ADEA occurs."); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987) ("We find the knowing or reckless disregard standard difficult to reconcile with the admonition to avoid imposing liquidated damages in every case, at least in the context of disparate treatment cases"). See also Note, *Liquidated Damages and Statute of Limitations Under the "Willful" Standard of the Fair Labor Standards Act and Age Discrimination in Employment Act: Repercussions of Trans World Airlines, Inc. v. Thurston*, 24 Washburn L.J. 516, 520 n.45 (1985) ("Where proof of the employer's state of mind is required on the liability issue, it is difficult for an employer to escape a 'willful' determination. In other words, if the jury finds the employer intentionally discriminated against the employee on the basis of age, it will automatically follow that such actions were 'willful' for the purposes of liquidated damages.").

One commentator has analyzed the dilemma of applying the *Thurston* formula — developed to address a disparate impact claim — to individual discriminatory treatment cases in the following way:

"*Thurston* was a case involving company policy which affected employees as a group. As a result, subsequent courts have categorized it as a disparate impact case. Several courts have discovered that when *Thurston* is applied in

disparate treatment cases, a finding that age was a determinative factor in the employer's decision is also a finding of 'willfulness' in almost every case. This result occurs for two reasons. First, the ADEA's requirement that covered employers post notices about the ADEA in their workplaces makes it impossible for an employer to show that he or she did not know that the ADEA was potentially applicable. Second, a finding that age was a determining factor in the employer's decision makes *Thurston's* 'good faith' defense unavailable to an employer since one cannot be found to have *intentionally* discriminated against an individual in *good faith*.

This problem does not arise in disparate impact/company policy cases such as *Thurston*. In those cases, the factfinder looks at the employer's decision regarding an employment policy and determines whether the employer 'knew or showed reckless disregard' for the matter of whether its policy violated the ADEA, or whether, after considering potential ADEA applicability, the employer decided in good faith that the policy did not violate the Act."

See Cluxton-Kremer, *Redefining "Willful" in the Liquidated Damages Provision of the Age Discrimination in Employment Act: The Tenth Circuit's Approach*, 68 Denv. U.L. Rev. 485, 495-96 (1991) (footnotes omitted).

As the foregoing courts and commentators have recognized, a definition of willfulness that guarantees the imposition of liquidated damages in every discriminatory treatment case plainly disserves the punitive purposes of Section 7(b). Indeed, such a standard is flatly inconsistent with this Court's admonition in *Thurston* that liquidated damages should be available only in a limited number of cases. Thus, in individual discriminatory treatment cases such as the present one, a more refined and differentiating standard of willfulness is required.

3. The Majority Of Courts Applying ADEA Section 7(b) To Discriminatory Treatment Claims Require The Evidence Of Liability To Meet A Higher Standard Of Outrageous Or Egregious Conduct

Since *Thurston*, seven federal circuits have held that a higher standard must be met before liquidated damages can be awarded in a discriminatory treatment case. Thus, the Third Circuit has required ADEA plaintiffs to establish "some additional evidence of outrageous conduct" to warrant the imposition of liquidated damages. See *Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Similarly, the Fifth Circuit requires evidence of "egregious" actions beyond ordinary age discrimination to permit the assessment of liquidated damages. See *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989).

Echoing the "outrageous" and "egregious" tests for distinguishing ordinary violations of the ADEA from "willful" ones, the Sixth and Tenth Circuits have held that a plaintiff may recover liquidated damages only if he proves that age was the "predominant factor" in the employer's discharge decision. See *Schrand v. Pacific Electric Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).³²

³² The Court of Appeals below misread these cases when it stated that "[i]n this circuit, the 'determining factor' ingredient added by the Sixth and Tenth Circuits to the *Thurston* standard for proof of a 'willful' violation of ADEA in disparate treatment cases is already a basic requirement for proof of the underlying ADEA violation itself." See Cert. Pet. A-20. This assertion is wrong in two significant respects. First, the requirement that unlawful consideration of age be a "determining factor" to permit predicate ADEA liability is not a requirement particular to the First Circuit, but is rather a basic element of causation applied in all discrimination cases. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). More importantly, the willfulness standard adopted by the Sixth and Tenth Circuits is not a restatement of the statute's basic "determining factor" test. To the contrary, these courts hold that, not only must age be a consideration that makes a difference in the employer's decision (i.e., a "determinative" or "determining" factor); it must further be the *predominant* factor in the decision. See, e.g., *Cooper*, 836 F.2d at 1551 (distinguishing

Finally, the Fourth, Seventh and Eighth Circuits — while eschewing precise verbal formulations or tests — have all held that in order for a plaintiff in a discriminatory treatment case to prove willfulness, he must introduce a greater quantum of evidence than that required for underlying ADEA liability. See *Aungst v. Westinghouse Electric Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991) (to prove willfulness, a plaintiff “must provide evidence beyond that which would prove an ordinary claim of age discrimination”); *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (construing willfulness to require “direct evidence — more than just an inference from, say, an arguably pretextual justification — of age-based animus”); *Gilliam v. Armtex Inc.*, 820 F.2d 1387, 1390-91 (4th Cir. 1987) (stating that evidence of age discrimination that is “too thin” will not sustain liquidated damages). See also *EEOC v. District of Columbia Dep’t of Human Services*, 729 F. Supp. 907, 917 (D.D.C. 1990), *vacated without op.*, 925 F.2d 488 (D.C. Cir. 1991) (“some evidence in excess of that necessary to establish a violation [of the ADEA] is needed to support a finding of willfulness”).

Although the seven circuits and one district court cited above have identified different factors which, in their view, would warrant an award of liquidated damages under Section 7(b), all agree that something more must be shown than that the employer simply knew or displayed reckless disregard that its conduct violated the ADEA.³³ The consensus of these courts ap-

“determining” factor from “predominant” factor: “Under the standard we adopt today, a basic finding of liability under the Act requires that age be at least one of the possibly several ‘determinative factors’ in the employer’s conduct; for a willful violation to exist in a disparate treatment claim, a factfinder must find that age was the *predominant* factor in the employer’s decision.” (emphasis in original).

³³ Even circuits that have purported to adhere strictly to the language of *Thurston* when evaluating claims for liquidated damages under Section 7(b) have acknowledged the need to distinguish ordinary from willful ADEA violations in the governing standard. See *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989) (applying *Thurston*’s “knew or showed reckless disregard” standard, but observing “that ‘willfulness’ is most easily understood when the term is analyzed along a continuum”, and attempting

pears to be that the employer’s conduct must in some *further* sense have been outrageous or egregious, such as where age is not merely one motive but the sole or predominant motive for the employer’s action, or, alternatively, where the employer has routinely or repeatedly discriminated against older persons through a pattern of oppressive treatment.

4. A Higher Standard Of Willfulness For Discriminatory Treatment Actions Fulfills Congress’s Intent That Liquidated Damages Be A Punitive Remedy Reserved For Exceptional Cases

The foregoing appellate decisions are plainly correct because, once again, application of the “knew or showed reckless disregard” standard alone would lead to an automatic doubling of damages in almost every successful discriminatory treatment case brought under the ADEA — a result contrary to the explicit Congressional intent recognized by the Court in *Thurston*. The Court of Appeals below acknowledged as much, but thought itself bound to reach this inappropriate result “at least until either Congress or the Supreme Court changes the definition of willfulness.” See Cert. Pet. A-20. The First Circuit failed to discern, however, that “willful” is not an inflexible term and, depending on the context in which it is used, may properly import the kind of egregious behavior required by the courts referred to above. See generally Senate Comm. on the Judiciary, *Report on Criminal Code Reform Act of 1979*, S. Rep. No. 96-553, 96th Cong., 2d Sess. 59 (1980) (“The courts have defined a ‘willful’ act as an act done voluntarily as distinguished from accidentally, an act done with specific intent to violate the law, an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is

to define certain classes of predicate ADEA violations that will not permit the award of liquidated damages); *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 631-32 (11th Cir. 1990) (applying *Thurston*, but noting that “[t]o ensure that a separation exists between [ordinary and willful] liability, we have recognized that a showing that an employer engaged in intentional age discrimination does not automatically entitle a plaintiff to receive liquidated damages”).

lawful, and an act done with careless disregard whether or not one has the right so to act."').³⁴

The circuit decisions which place an interpretive gloss on *Thurston* in individual disparate treatment cases also fulfill the Congressional purpose that liquidated damages be punitive in nature. "Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's conduct was *especially reprehensible*." *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032, 1062 (1991) (O'Connor J., dissenting) (emphasis added). See also *Day v. Woodworth*, 55 U.S. (13 How.) 363, 371 (1852) ("It is a well-established principle of the common law that ... a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view *the enormity of his offence* rather than the measure of compensation to the plaintiff"); American College of Trial Lawyers, *Report On Punitive Damages Of The Committee On Special Problems In The Administration Of Justice* 13 (1989) ("In addition to requiring knowledge, the instruction to the jury should state that punitive awards are to be made only in those cases in which it is established that the tortfeasor acted in a particularly egregious manner."). At least in the context of a statute typically requiring an intent to discriminate as a predicate to basic liability, the "knew or showed reckless disregard" standard is inadequate, by itself, to delineate those circumstances in which the defendant's misconduct is "especially reprehensible" so as to warrant punitive sanction. See Cluxton-Kremer, *supra* at 504 (arguing for differentiated standard of

³⁴ In this regard, it is important to note that the Court's approval of the "knew or showed reckless disregard" standard in *Thurston* as "reasonable" and "acceptable" in a disparate impact action, see 469 U.S. at 129, by no means forecloses its articulation of a different standard for willfulness in the context of a different type of discrimination case. "The Court [in *Thurston*] confined its holding to a relatively narrow point. It rejected some expounded definitions ... but did not render a blanket rejection of all possible definitions of willful." Charland, *Willfulness, Good Faith, and the Quagmire of Liquidated Damages Under the Age Discrimination in Employment Act*, 13 J. Corp. Law 573, 596 (1988).

willfulness in discriminatory treatment and disparate impact cases: "A single uniform standard for both types of cases will result in automatic liquidated damages assessments in disparate treatment cases since intent is required for a basic finding of liability").

For this reason, the better view of federal courts applying Section 7(b) of the ADEA to individual disparate treatment claims is to require the plaintiff to demonstrate something more in the way of reprehensible conduct by the employer than that sufficient to permit an inference of ordinary age discrimination. This requirement both preserves the Congressional intent of maintaining distinct tiers of predicate and willful ADEA liability, and is consistent with the view taken by numerous courts that punitive damages should be reserved for exceptional cases.

For example, under the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. § 1981, which prohibits race discrimination in connection with the making and enforcement of contracts, a finding of intentional discrimination has been held insufficient to allow for punitive damages in the absence of further evidence of particularly egregious conduct. Thus, in *Stephens v. South Atlantic Cannery, Inc.*, 848 F.2d 484 (4th Cir.), *cert. denied*, 488 U.S. 966 (1988), the court stated that section 1981's punitive sanction "is an extraordinary remedy and is designed to punish and deter particularly egregious conduct. Although any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Id.* at 489-90 (striking punitive damages notwithstanding jury's finding of predicate discrimination liability) (emphasis added). Accord, *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1314 (7th Cir. 1985) ("In a section 1981 action, a finding of liability for discrimination against a defendant does not automatically entitle the prevailing plaintiff to an award of punitive damages"; "Although a punitive damage award may be appropriate in some cases to punish a wrongdoer for his or her outrageous conduct ... such award must be supported by the record"); *Lindsey v. Angelica Corp.*, 508 F. Supp. 363, 366-67 (E.D. Mo. 1981) (finding that while employer's "proffered

justification [for plaintiff's rejection] [was] merely a pretext for illicit discrimination," the "[d]efendant's actions were not malicious or in willful derogation of plaintiff's rights" so as to justify punitive damages); *Darensbourg v. Dufrene*, 460 F. Supp. 662, 665 (E.D. La. 1978) (same). Cf. *Adickes v. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part and dissenting in part) ("To recover punitive damages, I believe a plaintiff must show more than a bare violation of § 1983").³⁵

For the foregoing reasons, this Court should adopt the reasoning embraced by the majority of circuits that have addressed the question of liquidated damages in individual discriminatory treatment cases. In such cases, to recover double damages under Section 7(b) of the ADEA, a plaintiff must show both that his employer knew or showed reckless disregard that its conduct violated the statute, and further that the employer's actions were repeated, without colorable justification, or were otherwise harsh, egregious or outrageous. Requiring such proof

³⁵ The principle that, in cases where improper intent is part and parcel of the underlying violation, a further showing of egregious or aggravated misconduct is required to subject the defendant to punitive damages finds further support in common law decisions. In *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App.3d 83, 401 N.E.2d 1356 (Ill. App. 1980), for example, the court stated:

"Punitive damages are awarded to punish and deter because of aggravated misconduct on the part of the defendant. However, *punitive damages should not be awarded if the defendant's misconduct is not above and beyond the conduct needed for the basis of the action*. If the plaintiff proves sufficiently serious misconduct that warrants punitive damages, the question of whether or not to award them is left to the jury. But it is for the trial court, in the first place, to say whether the plaintiff has proved misconduct aggravated enough to present the issue of punitive damages to the jury."

O'Brien, 401 N.E.2d at 1359 (emphasis added). See also *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921, 928 (4th Cir. 1984) ("even in respect of tort claims having as essential elements 'fraudulent,' or 'false,' or 'malicious' states of mind, Virginia does not permit recovery of punitive damages except upon proof of a degree of aggravation in the critical state of mind above the threshold level required to establish liability for compensatory relief").

to establish willfulness in disparate treatment actions fulfills the Congressional intent of two-tiered ADEA liability, and properly reserves punitive damages for those cases involving the most flagrant violations of the law.

B. There Was No Probative Evidence Warranting An Award of Liquidated Damages In This Case

Applying any reasonable definition of the term, there was no probative evidence that Petitioners committed a "willful" violation of the ADEA in their decision to terminate Biggins' employment. There was no evidence that Petitioners engaged in a pattern of discriminatory behavior toward older workers; nor was there evidence that Biggins was singled out for particularly harsh or oppressive treatment for reasons relating to his age. Indeed, as set forth *supra*, the evidence permits no inference that the Hazens took *any* actions against Respondent because of his age.

The most the evidence showed was that Petitioners, after discovering that Biggins was marketing the services of another company to Hazen Paper competitors, asked him to sign a confidentiality and non-competition agreement. Given Respondent's sensitive position as both Hazen Paper's Technical Director and a member of its Executive Committee, such conduct was hardly extreme or outrageous, nor was it "especially reprehensible" so as to warrant particular punishment and deterrence. See *Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989).³⁶

By his own admission, Biggins refused to sign the proffered confidentiality agreement *not* because he believed its terms were unduly harsh or unreasonable, but rather because Petitioners refused to accede to his demand that Hazen Paper

³⁶ To the extent the evidence showed anything else at all, it simply demonstrated a recurring conflict between employer and employee over appropriate compensation and purportedly promised stock benefits — matters that by any standard are unexceptional in the typical labor-management relationship.

pay him \$100,000 per year in salary or Company stock. (J.A. 86-87.) Faced with Respondent's rejection of a confidentiality agreement in the absence of additional remuneration, Petitioners offered Biggins a consulting arrangement that would have, among other things, secured his pension benefits. It was only after Biggins spurned this offer as well that the Hazens terminated his employment. Once again, even assuming that such conduct could somehow be construed as age discrimination, it was in *no* sense aggravated wrongdoing of so egregious a nature as to warrant the imposition of *punitive* damages under the heightened standard contemplated by Section 7(b).

C. Even An Unmodified Application of *Thurston* Will Not Justify An Award Of Liquidated Damages Against The Petitioners

As a final point, Petitioners submit that evidence of any blameworthy behavior on the part of the Hazens in this case is so totally lacking that even an undifferentiated application of *Thurston* cannot justify the assessment of liquidated damages. There is no colorable basis in the evidence that Petitioners "knew" their actions toward Biggins violated the ADEA, or that they acted with "reckless disregard of the requirements of the ADEA." *Thurston*, 469 U.S. at 130 (quotations omitted). The First Circuit's novel construction of ADEA liability (*viz.*, that Petitioners' alleged intent to deprive Biggins of his service-based pension rights constituted age discrimination) is clearly not manifest in the language of the statute. Indeed, for all of the reasons set forth above, the ADEA cannot fairly be read to support liability on the basis of such an intent. Nor is ADEA liability premised upon interference with age-indifferent pension rights supported by the cases. To the contrary, the preponderance of the case law holds that employment decisions based on so-called age "proxies" (such as pension status or seniority) cannot give rise to ADEA violations. *See supra* Part I(A)(2).

Given the lack of textual support in the statute for a predicate finding of age discrimination on the basis of pension interfer-

ence, and given the contrary decisions of several federal courts, the failure of two businessmen to divine the dubious grounds of liability settled on by the First Circuit can hardly amount to either a "knowing" violation or "reckless disregard" for whether their conduct violated the ADEA. An employer's incorrect but good faith belief that his actions comply with the statute clearly precludes the imposition of liquidated damages — even under the standard of willfulness approved in *Thurston*. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988). *See also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication.") (applying "reckless disregard" standard to libel claim).

A finding of willfulness on the facts of this case, based solely on Thomas Hazen's testimony that "he was 'absolutely' aware that age discrimination was illegal," would in effect revive the "in the picture" test for liquidated damages expressly rejected by this Court in *Thurston*. *See Thurston*, 469 U.S. at 127-28 ("We are unpersuaded . . . that a violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA."). *See also McLaughlin v. Richland Shoe Co.*, 486 U.S. at 133 (defendant's statement that he knew FLSA existed and that it applied to his company did not satisfy the *Thurston* standard, where there was no indication that defendant knew that his particular actions violated the statute). Such a result would be both contrary to well-reasoned precedent, and unwise as a matter of policy.³⁷

³⁷ As the National Association of Manufacturers and Associated Industries of Massachusetts aptly remarked in their Brief of Amici Curiae to this Court (at p. 7), "since virtually every business person in the land knows that age discrimination is illegal, the First Circuit's test shields only liars or fools from double damages in ADEA cases." *See also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (a standard of willfulness requiring no more than an awareness of the law "would seem to apply only to ignorant employers, surely not a state of affairs intended by Congress").

To uphold the jury's finding of willfulness here would visit burdensome punitive damages on a company that had no grounds to conclude — or even to suspect — that its conduct was prohibited by the ADEA. Thus, even if the ADEA is construed to require compensatory damages in these circumstances, punishment is certainly not appropriate. By the same token, the goal of deterrence embodied in Section 7(b) cannot possibly be served by assessing punitive damages against a defendant who neither knew nor had reason to know that its actions violated the ADEA.

In sum, the punitive remedy of liquidated damages is not warranted on the facts of this case. The evidence of record permits no reasonable inference that Petitioners terminated Biggins' employment either because of his age or for reasons related to his age. Even if such an inference could properly be drawn, the evidence is still insufficient to sustain a finding of willfulness under *any* rational definition of the term — including the one applied in *Thurston*.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals below should be reversed, and judgment should enter in favor of Petitioners on Respondent's claims under the ADEA.

Respectfully submitted,

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UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Washington, D.C. 20535

HAZEN PAPER COMPANY, ET AL.

Petitioners

WALTER F. BUCKING

Respondent

IN RE: HAZEN PAPER COMPANY, ET AL.
AND WALTER F. BUCKING

Questions Presented.

1. Whether the Circuit Court correctly determined that the standard established by this Court in *Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111 (1985), for proving a willful violation of the Age Discrimination in Employment Act applies to a case of individual discriminatory treatment?

2. Whether the courts below correctly held that an individual's termination on the eve of his pension vesting may be considered as evidence of age discrimination?

List of Parties.

The parties to the proceedings below were the respondent Walter F. Biggins and the petitioners Hazen Paper Company, Robert Hazen and Thomas N. Hazen.

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No. 91-1600

IN THE
Supreme Court of the United States

October Term, 1992

HAZEN PAPER COMPANY, ET AL.,

Petitioners,

v.

WALTER F. BIGGINS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS

Statement of the Case.

This case arose out of the termination of the respondent Walter Biggins from his employment at the petitioner Hazen Paper Company (hereinafter Hazen). At the time of his discharge, Mr. Biggins was sixty-two years old. He was terminated after being falsely accused of disloyalty to the company. There were numerous specific incidents of disparate treatment of Mr. Biggins in the circumstances leading up to his termination, including requesting him to sign a confidentiality and non-compete agreement that was not being required of the younger technical department employees, and proposing that he remain with the Company as a consultant and surrender his health, life, and other employee benefits enjoyed by the younger members of his department. On his refusal Mr. Big-

gins was fired on the eve of his pension vesting. He was replaced by a thirty-five year old who received all these benefits.

Prior Proceedings.

In February 1988, the respondent, Mr. Biggins, commenced this action in the District Court of Massachusetts. The complaint sought relief for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, et. seq., Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140, and state law claims for fraud, breach of contract, wrongful discharge and violations of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I. After a five-day trial, the jury returned verdicts in response to special questions in favor of Mr. Biggins under the ADEA (damages \$560,775), ERISA (damages \$100,000), breach of contract (damages \$266,897), fraud (damages \$315,000), Massachusetts Civil Rights Act (damages \$1), and wrongful discharge (\$1). (J.A. 193-197).¹ The jury found the violation of the ADEA to be willful. (J.A. 193).

The district court granted the defendant Hazen's motion for judgment notwithstanding the verdict on the Massachusetts Civil Rights claim and on the willfulness finding. (Cert. Pet. A-88). The district court disallowed the jury's finding of willfulness on grounds that a finding of willfulness required "direct" evidence and "proof to push the level of conduct to a higher plateau," citing *Neufeld v. Searle Laboratories*, 884 F.2d 335 (8th Cir. 1989). (Cert. Pet. A-62).

On cross appeals, the Court of Appeals for the First Circuit reinstated the jury verdict on the issue of willfulness, reversed

¹References are as follows: Joint Appendix: J.A.; Hazen's Petition for Writ of Certiorari: Cert. Pet.; Appendix for First Circuit Court of Appeals: C.A. App.; Hazen Brief: Pet. Brf.

the award for breach of contract, reduced the amount of damages awarded under the ADEA and affirmed all other parts of the verdict. (Cert. Pet. A-48-49). The Circuit Court reinstated the jury's verdict on willfulness by adopting without change this Court's definition of willfulness as set forth in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and rejecting the standard created by the district judge. (Cert. Pet. A-20). Motions for rehearing and hearing en banc were denied. (Cert. Pet. A-2).

Petitioners then sought certiorari on the question of whether *TWA v. Thurston* may be applied to claims of individual discriminatory treatment and whether an employer's interference with an employee's pension vesting violates the ADEA. On June 22, 1992, this Court granted the Petition for Writ of Certiorari.

The Facts.

Walter Biggins graduated from high school in his hometown of Worcester, Massachusetts, in 1943, and at age eighteen went into the Army.² (J.A. 45). He returned home in 1945 and with many others availed himself of the "G.I. Bill" to obtain a Bachelors and Masters Degree in Chemistry from the College of the Holy Cross, also in Worcester. (J.A. 45). Virtually all of his adult life was spent as a chemist and executive in the paper industry. (J.A. 46-47). In 1977 he was hired by Hazen as its technical director. (J.A. 47). The principals of Hazen had no technical background and hired Mr. Biggins because he was the most qualified applicant for the job. (C.A. App.

²At footnote 9 of their brief, the petitioners assert that they accept, in their statement of facts, the respondent's evidence as true. However, they admit they "supplement" that evidence with evidence from petitioners they claim to be " . . . neither impeached nor substantively contradicted at trial" (Pet. Brf. p.7 n.9). No authority is given by the petitioners for incorporating in their facts evidence which is unfavorable to the respondent which the jury was not required to credit.

855). Hazen is a paper converter that specializes in applying decorative coatings to paper used primarily for cosmetic wrap, lottery ticket stock, and pressure sensitive labels. (J.A. 48).

At the time Mr. Biggins was hired, the paper converting industry was mandated to find a method to neutralize the hazardous emissions resulting from the use of nitrocellulose and vinyl coatings or develop emission-free alternative coatings. (J.A. 52-53). Mr. Biggins embarked, on his own initiative, on a program to develop new coatings which would be acceptable to customers and comply with the changing environmental laws. (J.A. 54). Mr. Biggins, through a long and complex process, working primarily on his own time at home and continuing all his other duties at the plant, developed a water-based coating acceptable to the customers of Hazen Paper which complied with all new laws and regulations. (J.A. 56-59). The coating came to be called "Biggins' Acrylic" at Hazen. (J.A. 61). By 1983 Mr. Biggins, working with Mr. Robert Hutchinson, Hazen's manufacturer's representative, gained acceptance of the Biggins' Acrylic by the technical department of the dominant manufacturer in the pressure sensitive label industry. (J.A. 62-63).

The development by Mr. Biggins of his water-based coating was essential to the future success of Hazen and gave it a substantial advantage over its competitors. (C.A. App. 648). Thomas Hazen himself said of the Biggins Acrylic, "... the future growth of the company depends on it." (C.A. App. 1558). Mr. Hutchinson, Hazen's manufacturer's representative, testified that the development at Hazen of the water-based coating before any of its competitors gave Hazen an absolute advantage in the pressure sensitive market that allowed its market share to grow from 25 percent in the late seventies, to 65 percent at the time of trial. (C.A. App. 638-639).

Following the development of the Biggins' Acrylic, the sales of Hazen increased from \$8,994,000 in 1977 to \$28,815,000 in

1986 and \$40,554,000 in 1989. (C.A. App. 1276, 1304; 1410). Biggins' Acrylic was an unusually profitable item for Hazen. (J.A. 68, C.A. App. 338-339; 852).

In 1983 and thereafter, Mr. Biggins had several conversations with Thomas Hazen concerning his compensation. (J.A. 71-73). As a result of these discussions, Mr. Biggins was promised stock in Hazen as a part of his compensation. (J.A. 72-73).¹ That stock was not forthcoming. After waiting well into 1985, Mr. Biggins became more outspoken in his demands for the promised stock. (J.A. 76-77). The Hazens put him off.² (J.A. 74-77).

On May 24, 1986, Thomas and Robert Hazen called Mr. Biggins into their offices at the company and accused him of being involved in the operation of outside businesses. (J.A. 78-79). Mr. Biggins was perplexed because both the businesses mentioned were established for the benefit of his son Timothy. (J.A. 84). Further, Mr. Biggins had previously told Thomas Hazen about both businesses, and that he was going to assist his son. (J.A. 80). Thomas Hazen had approved. (J.A. 80). Walter Biggins' son, Timothy, did all the work in both businesses. (J.A. 84; 123-127). One of the businesses had ceased all operations two years previously in 1984. (J.A. 79).

On June 3, 1986, as a follow up to the previous discussion, Thomas Hazen gave Mr. Biggins an agreement to sign. (J.A. 80-81). The agreement included a two-year covenant not to compete during which Mr. Biggins would be paid no severance at all and a clause conveying to Hazen Paper rights in anything Mr. Biggins had invented or developed. (J.A. 169-171). Mr.

¹The petitioners in their statement of facts say Thomas Hazen's testimony clarified Mr. Biggins' "ambiguous" testimony by claiming Mr. Hazen only talked of "considering" some "phantom stock options." (Haz. Brf. 10-12). They failed to note the jury specifically found that the stock promise was made. (J.A. 194).

²The jury awarded Mr. Biggins \$315,000 for fraud by the Hazens in falsely promising the stock and not giving it to him. (J.A. 195). The judgment for fraud was affirmed by the district and circuit courts and is now final.

Biggins had the agreement reviewed by his family lawyer and offered to sign it, provided his compensation arrangement, including the promised stock, was incorporated. (J.A. 86-87). Thomas Hazen refused and instead suggested Mr. Biggins accept a consulting arrangement under which he would lose all his employee benefits but still be available to the company. (J.A. 87, 153, 160-161).

None of the other employees in the technical department at Hazen, all of whom were in their thirties, were presented with such agreements nor were they asked to become consultants and give up all their employee benefits. (J.A. 85).

On June 13, 1986, Mr. Biggins was within hours of his pension vesting.¹ (J.A. 88). Thomas Hazen called him into his office and told him to sign the agreement without any changes or be fired. (J.A. 88). Mr. Hazen then fired Mr. Biggins. (J.A. 88). Although the asserted reason for the firing was disloyalty, Thomas Hazen told Walter Biggins just days before the termination that he had been a "loyal" employee who always gave 100 percent to the company. (J.A. 86).

Previously Mr. Biggins had been told by the Hazens that his life insurance policy was costly because he was so old and that he was "too old" to take advantage of the company's membership in a health club. (J.A. 99).

It took Hazen almost a month to pay Mr. Biggins for the time he worked in June of 1986. (J.A. 90). Hazen denied Mr. Biggins any earned or accumulated vacation pay. (J.A. 90-91). Hazen paid Mr. Biggins no severance after his almost ten years of service. (J.A. 91). When Mr. Biggins applied for unemployment compensation, Thomas Hazen, in order to deny any benefits to him, instructed the company comptroller to falsely

¹Because he was over age sixty, Mr. Biggins was able to immediately draw benefits from the pension plan if he chose. (J.A. 182).

inform the State Division of Employment Security under oath that Mr. Biggins had voluntarily quit. (See *infra* Add. to Brf. A-1.)^{*}

Walter Biggins, in the summer after he was fired, joined his son Timothy in the remaining outside business that his son had been running. (C.A. App. 405). Mr. Biggins did this after learning there was a "limited" employment market for someone his age. (C.A. App. 405).

Mr. Biggins was replaced by Timothy McDonald, a thirty-five-year-old research chemist hired from a competitor. (C.A. App. 779). Mr. McDonald was given a written employment agreement which, unlike Mr. Biggins', did include his compensation arrangement with the Company, provided him with a severance pay package of 100 days, and granted him a favorable covenant not to compete of only 180 days. (J.A. 176-180). Mr. McDonald's agreement provided he would be paid during 55.5 percent of the time he was prohibited from working by his covenant not to compete. (J.A. 177). Mr. Biggins was to be paid nothing for the two years he could not work. (J.A. 169-171).

Despite petitioners' continued assertions that the discharge was the result of disloyalty, Mr. Biggins presented evidence directly rebutting these claims. The jury, charged under the standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), found the allegations of disloyalty to be unworthy of credence and a pretext for willful age discrimination.

^{*}In the Joint Appendix, the Hazens' response to the state was incorrectly reproduced. As printed, it omitted the language which stated the response was filed under oath, and which showed the Hazens could have selected discharge instead of voluntary quit as the reason for separation. Both parties have agreed, with the permission of the Clerk, to reprint the complete exhibit in the Addendum to this brief.

Summary of Argument.

I. Under the ADEA, a victim of age discrimination may recover liquidated damages if the jury concludes that the violation of the statute was "willful." In affirming the jury's verdict that the violation was willful, the Circuit Court applied the standard of "willfulness" approved by this Court in *Trans World Airlines, Inc. v. Thurston*, *supra*, and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), which require a finding that the employer knowingly violated the ADEA, or that the employer acted with reckless disregard for whether its conduct violated the law. The Circuit Court's application of the *Thurston* definition of "willfulness" in a case of discrimination against an individual was proper because (1) the "knowing or reckless disregard" standard is consistent with plain meaning of the term, (2) nothing in the legislative history of the ADEA even remotely suggests that Congress intended the term "willfulness" to have a different meaning in cases of discrimination against an individual than in cases involving employment policies with a disparate impact on older workers, (3) Congress has employed the concept of willfulness to establish "two-tier" liability under a number of statutes, none of which has been judicially interpreted to require either "outrageous" conduct or "direct" evidence of discrimination in order to prove willfulness, and (4) liability for double damages will not follow automatically in every case of age discrimination against an individual because the discriminating employer may avoid a finding of willfulness by proving that the intentional conduct was motivated by a good faith, though erroneous, belief that the employer was not violating the ADEA.

II. This case is not one where the Circuit Court equated pension discrimination with age discrimination because the jury considered other evidence of age discrimination having nothing to do with respondent's pension status, including de-

rogatory comments about his age, compulsion to enter into a confidentiality agreement with oppressive terms not required of younger employees, and the fabrication of pretextual reasons for his firing and replacement by a younger person. The courts below relied on all of this evidence in upholding the jury's verdict. The question of whether an employer's improper interference with pension vesting can be used to support a finding of age discrimination was not preserved below because the petitioners neither objected to the introduction of this evidence on the ADEA claim, nor requested a jury instruction that such evidence was not to be considered by the jury on the ADEA claim. In any event, evidence that an employer discharged an individual in order to interfere with his pension vesting is admissible under the ADEA as evidence of age discrimination. The evidence was particularly appropriate here, where the respondent was discriminated against on the basis of all his employee benefits when he was sixty-two years of age and would otherwise have been eligible to draw pension benefits because of his age, and when considered with all the other evidence of discriminatory conduct.

Argument.

I. THE FIRST CIRCUIT CORRECTLY APPLIED *TWA v. Thurston* TO THIS CASE OF AGE DISCRIMINATION AGAINST AN INDIVIDUAL.

The First Circuit's decision is consistent with this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and petitioners present no sound reason why that holding should either now be reversed or not applied to the circumstances of this case. The *Thurston* standard comports with the plain meaning of the statute. It provides a uniform

definition of the term "willful" under the ADEA that is consistent with the meaning of "willfulness" under other federal statutes and is supported by Congressional intent and legislative history. In contrast, the standard proposed by the petitioners is a standard adhered to only in part by a single circuit. It does not logically follow from any accepted definition of the term "willful" and would effectively rewrite the statute.

The relevant provision of the ADEA provides: "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626 (b).

This Court has previously determined that under 29 U.S.C. § 623(b) the term "willful" means whether the defendant "knew or showed reckless disregard" for whether its conduct violated the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 126. In the present case, the First Circuit adhered to this standard in affirming the jury's finding of willfulness.

In *Thurston* this Court unanimously held that this definition of "willful" was consistent with the legislative history and "consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." *Id.* at 126. The Court rejected evil motive, bad purpose or a specific intent to violate the Act as necessary to recover liquidated damages, and made clear that the employer could avoid liquidated damages by showing it acted reasonably and in good faith in attempting to determine if it was violating the Act. *Id.* at 129.

At the time of trial, the jury was charged according to the *Thurston* standard, but the court told the jury that it must also find that the "... Defendants, with bad purpose, intentionally disobeyed or ignored the law." (J.A. 166)⁷.

⁷ The Circuit Court's opinion correctly noted of the instruction: "This instruction went further than necessary because the bad purpose requirement established by this Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27,] was eliminated by *Thurston*, 469 U.S. at 126 n.19. The instruction misstated the applicable law, and thereby prejudiced the plaintiff because it held him to a higher standard of proof than is required by *Thurston* and this circuit." *Haz. Pet.* A-21.

The petitioners did not object to this instruction, or offer any alternative instruction. The jury returned a finding of willfulness. (J.A. 193) The petitioners then filed a motion for judgment notwithstanding the verdict and the district court granted the motion, holding:

Upon consideration of *Neufeld* and similar authorities, the court now holds that plaintiff, in order to recover liquidated damages, must prove that the employer engaged in specific age-based conduct that rises above an ordinary ADEA violation. Inferential evidence of discrimination is not enough to establish willfulness. Mere proof of an ADEA violation, without more, does not adequately distinguish between ordinary and willful violations of the ADEA. There must be proof sufficient to push the level of conduct to a higher plateau.

(Cert. Pet. A-59-60).

The First Circuit Court of Appeals reversed, stating:

We, therefore, adopt, without modification or qualification, the *Thurston* test for willfulness: "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Thurston*, 469 U.S. at 128 (citation omitted).

(Cert. Pet. A-20).

A. Plain Meaning Supports Application of the Thurston Standard for Determining Willfulness in Individual Age Discrimination Cases.

The starting point of any inquiry into the meaning of a statute is the language of the statute itself. *U.S. Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 604 (1986); *United States v. James*, 478 U.S. 597, 604 (1986); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, *reh'g denied*, 423 U.S. 884 (1975). Legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *United States v. James*, 478 U.S. at 604. It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The definition of the term "willfulness" adopted by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 126, and *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 133, complies fully with these standards. In *McLaughlin* the Court stated:

In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate" and "intentional." See Roget's International Thesaurus § 622.7 p 479, § 653.9 p 501 (4th ed. 1977). The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston* — that the employer knew or showed reckless disregard for the matter of whether its con-

duct was prohibited by the statute — is surely a fair reading of the plain language of the Act.

McLaughlin v. Richland Shoe Co., 486 U.S. at 133.

Certainly nothing about the term "willful" itself, or its statutory context here, implies in any way an intent to create a different meaning for "willful," depending on the type of evidence presented, whether the plaintiff is an individual or a group, or whether the actions taken are somehow more "outrageous" or "egregious" than any other willful violation of the law.

In the face of these clear principles, petitioners propose an interpretation of "willfulness" completely divorced from any known or accepted meaning of the term "willful," and indeed not related to the meaning of the term at all. The proposal advanced by the petitioners substitutes an interpretation of the statutory language with a test based on the nature of the evidence introduced to prove the violation: a basis for statutory interpretation that is not logical, finds no support in any established theory of statutory construction, and in fact, could not be called statutory construction at all. It attempts not to define "willfulness" but, as they admit, puts "a gloss" on the term, presumably for the purpose of achieving their desired result. (Pet. Brf. 44). In no other statutory context has the term "willfulness" been interpreted in the manner proposed by petitioners.

Petitioners assert a need for a different standard for individual discriminatory treatment cases. (Pet. Brf. 35). Nowhere does the statute distinguish between "willfulness" in cases of "disparate impact," "systematic discrimination," or individual "disparate treatment" cases. Nor does the statute even remotely suggest that the term "willfulness" should have different meanings, depending upon the theory of the plaintiff's case. Respon-

dent is unaware of, and petitioners do not cite, any other statute where a single term is given different meanings on the basis of what type of plaintiff pursues the case and/or what type of evidence he presents. In fact, the statute is itself clear and unambiguous, and does not call for these elaborate and contorted attempts to judicially rewrite it.

B. Legislative History Supports Application of the Thurston Standard for Determining Willfulness in Individual Age Discrimination Cases.

The plain meaning of a statute is conclusive absent strong evidence clearly expressed that Congress intended a different meaning. *United States v. James*, 478 U.S. at 606; *United States v. Turkette*, 452 U.S. 576, 580 (1981). There is no such evidence here.

This Court has already determined that the standard of *Trans World Airlines, Inc. v. Thurston* is consistent with the legislative history of the ADEA. 469 U.S. at 125-126. The "willful" provision of the Act was proposed as a substitute for a criminal provision. *Ibid.* No reference was made to distinguishing between "disparate impact" or "disparate treatment" cases. Nothing in the legislative history remotely suggests a desire for the term "willful" to have different meanings depending upon the nature of the plaintiff's evidence. *Ibid.* What the legislative history does show is a strong connection between the ADEA and the Fair Labor Standards Act. See 29 USC § 216(b) (Act to be enforced in accordance with the FLSA)⁸. In *Trans World Airlines, Inc. v. Thurston*, the Court stated:

⁸ The House Committee report emphasized that the investigation and enforcement of the bill would be in accordance with the Fair Labor Standards Act. H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News 2213, 2222-2223 (1967).

This Court has recognized that in enacting the ADEA, "Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation. . .". *Lorillard[, Div. of Loew's Theatres, Inc.] v. Pons*, [434 U.S. 575, 581 (1978)]. The manner in which the FLSA has been interpreted, therefore, is relevant. . . . Given the legislative history of the liquidated damages provision, we think the "reckless disregard standard is reasonable."

469 U.S. 126.

This Court has also determined that under the FLSA:

The standard for "willfulness" that was adopted in *Thurston* — that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute — is surely a fair reading of the plain language of the Act.

McLaughlin v. Richland Shoe Co., 486 U.S. at 133.

There is, therefore, no basis within any legislative history for creating a wholly different standard for cases of individual disparate treatment. Nor is there any justification for adding to or subtracting from that term on the basis of some perceived desired result. See *C.I.R. v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987).

The argument that Congress desired, in creating a two-tiered scheme, some particular percentage of cases to fall into one category or the other, is pure speculation and wholly unsupported by any legislative history. The only reference points Congress had were the FLSA and the Equal Pay Act, where liquidated damages were mandated for every violation. 29

U.S.C. § 216. In any event, the *Thurston* standard was adopted because it *avoids* automatic double damages, a result that can obtain in the case of an individual, just as with a group. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 128.

Petitioners contend that the standard of the First Circuit "guarantees the imposition of liquidated damages in every discriminatory treatment case." (Pet. Brf. p. 40). This will hardly be so. Employers who intentionally discriminate on the basis of age will normally also know their conduct is illegal. However, the employer can always present evidence that he did not know his conduct was illegal, as well as the defense of good faith, where in fact he had reason to believe he was not governed by the act or that the actions involved were not covered. There are numerous defenses that would fit this category: the employer could have a legitimate belief that he is not large enough to be covered by the act, 29 U.S.C. § 630(b); he may have had a false belief that a particular employee was not within the act's protected group, 29 U.S.C. § 631; he may have legitimate reason to believe there is a bona fide occupational qualification or bona fide seniority plan requirement, 29 U.S.C. § 623(f); or that the employee is subject to the executive exemption under 29 U.S.C. § 631 (c)(1).

Where no legitimate good faith defense exists (and none was offered here) the violating employer is not the victim of some obscure legal rule, but someone who has knowingly and deliberately violated a federal law. There is absolutely no reason to believe that Congress did not fully intend to provide these limited additional damages against those who willingly flaunt the law.

C. Petitioners Advocate a Heightened Standard of Willfulness for Individual Age Discrimination Cases Which is Inconsistent With Judicial Interpretations of Willfulness Under Other Acts of Congress.

Petitioners urge the Court not to apply its definition of "willfulness" announced in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, simply because this case involves discrimination against an individual, while *Thurston* involved an employment policy of general application.

A "two-tiered" structure of liability is not unique to the ADEA. Congress has frequently required a finding of willfulness as a predicate to imposing higher liability under a number of civil and criminal statutes. This Court and the vast majority of lower courts have not adopted a higher standard of substantive conduct (such as "outrageousness" or "egregiousness"), in defining "willfulness." Neither has this Court erected special evidentiary barriers which dictate that a particular *quantum*, or *type*, of evidence be adduced to support a finding of willfulness. "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *U.S. Postal Service Bd. v. Aikens*, 460 U.S. 711, 714 n.3 (1983). Circumstantial evidence may be as probative as testimonial evidence. *Holland v. United States*, 348 U.S. 121, 140 (1954).

Congress first created a two-tiered liability structure for civil rights violations in the post-Civil War era when it enacted civil and criminal penalties for public officials who, acting under color of law, deprived individuals of constitutional rights. The principal difference between a civil violation under 42 U.S.C. § 1983 and a criminal violation under 18 U.S.C. § 242 is the element of willfulness. Nearly fifty years ago, this Court expressly rejected the notion that a willful violation of another's civil rights can only be proved with direct evidence. In *Screws v. United States*, 325 U.S. 91 (1945), this Court held that a

Court held that a conviction for willfully depriving another of constitutional rights would stand if the defendant acted in "reckless disregard of constitutional prohibitions or guaranties." *Id.* at 106. The evidence of willfulness could be entirely circumstantial:

And such purpose [to deprive one of constitutional rights] need not be expressed; it may at times be reasonably inferred from all the circumstances attendant upon the Act. See *Tot v. United States*, 319 U.S. 463 (1943).

Screws, 325 U.S. at 106.

The very discussion by the Court in *Screws* of the evidence by which willfulness was provable in that case reveals the fallacy in the petitioners' argument, that a finding of individual discrimination necessarily entails a finding of willfulness. The defendants in *Screws* were indicted for willful violations of civil rights when they arrested an individual who was charged with theft, handcuffed him, beat him with their fists and with blackjacks, and dragged him into jail where he died an hour later. *Screws*, 325 U.S. at 92-93. The outrageousness or egregious nature of such conduct is nevertheless irrelevant to the question of whether the actor who commits the intentional acts "knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right." *Screws*, 325 U.S. at 104.

Under the Internal Revenue Code, Congress has established a "two-tiered" structure of liability for nonpayment of income taxes, reserving criminal penalties for those who "willfully" evade taxes. The Code provides for less severe civil penalties in the event of a good faith mistake. See 26 U.S.C. §§ 6651, 6653. This Court and lower courts, in the long history of

interpreting the provisions of the Internal Revenue Code, have never felt it necessary to create by judicial decision a higher standard of willfulness, or a more difficult evidentiary burden of proof, in order to delineate the difference between willful and nonwillful conduct. Most recently in *Cheek v. United States*, 111 S.Ct. 604 (1991), where a taxpayer was charged with willfully failing to file a federal tax return in violation of § 7203 of the Internal Revenue Code, this Court held that a good faith misunderstanding of the law or a good faith belief that one is not violating a law may be considered by a jury to negate a finding of willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. *Id.* at 610. As in *Thurston*, 469 U.S. 111, and in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 108, the Court in *Cheek* applied a definition of willfulness which was broad enough to encompass a good faith but objectively unreasonable understanding of the law. So long as there was admissible evidence of a "voluntary, intentional violation of known legal duty," *Cheek*, 111 S.Ct. at 610, the question of willfulness under the Internal Revenue Code was one for the jury, rather than a legal one for the Court.⁹

If the defense to a charge of willful conduct is an asserted good faith belief that the act did not apply to the alleged conduct, the accused delinquent taxpayer finds himself in the same legal position as the employer sued under the ADEA — a finding of willfulness is avoided if "the jury believed him". *Cheek*, 111 S. Ct. at 611. This Court has not required proof of "outrageous" or "egregious" conduct in order to sustain a finding of willfulness under the Internal Revenue Code. See

⁹"Of course, in deciding whether to credit Cheek's good faith belief claim, the jury would be free to consider any admissible evidence from any source." *Cheek*, 111 S. Ct. at 611 [emphasis added].

¹⁰"Knowledge and belief are characteristically questions for the fact finder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it." *Id.*

United States v. Murdock, 290 U.S. 389 (1933) (conduct was willful within the meaning of the Revenue Acts of 1926 and 1928 if it was "marked by careless disregard [for] whether or not one has the right so to act." *Id.* at 395.).

This Court has recognized that where Congress has not limited the methods by which defendant can be liable for willful conduct, the Court should not "by definition constrict the scope of the Congressional provision that may be accomplished 'in any manner.'" *Ingram v. United States*, 360 U.S. 672, 676, (1959), quoting *Spies v. United States*, 317 U.S. 492, 499 (1943).¹⁰

There is no indication that Congress intended that a victim of age discrimination bear a heavier burden of proof on willfulness than that which courts have traditionally determined exists under numerous other federal statutes. When Congress enacted the willfulness provisions of the ADEA, presumably it was aware of prior judicial interpretations of the word.¹¹

¹⁰ Willfulness under the Tax Code has always been provable from circumstantial evidence. See *Spies v. United States*, 317 U.S. 492, 499 (1943) (willful attempt to defeat or evade income taxes may be "inferred" from improper bookkeeping practices "and any conduct, the likely effect of which would be to mislead or to conceal").

¹¹ See *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575 (1978); *United States v. Illinois Cent. R. Co.*, 303 U.S. 239 (1938) (failure to unload a cattle car was deemed "willful" under the Cruelty to Animals Act if the defendant showed a disregard for the governing statute and was indifferent to its requirements); *United States v. Murdock*, 290 U.S. 389, 394 (1933) (under Internal Revenue Code, the question of the defendant's asserted good faith is a matter for the jury which may find willfulness if defendant's conduct shows "careless disregard" of the statute's requirements); *F. X. Messina Constr. Corp. v. Occupational Safety & Health Review Comm'n*, 505 F.2d 701, 702 (1st Cir. 1974) (under Occupational Safety & Health Act, "indifference to the requirements of law may alone represent a willful statutory violation") [emphasis added]; *Primo v. Simon*, 606 F.2d 449, 451 (4th Cir. 1979) (Gun Control Act of 1968 does not require a showing of malicious intent in order to support a finding of willful violation); *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969) (threatening the life of the President; whether a threat was knowing and willfully made "is to be considered by the trier of fact in light of all the circumstances"); *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988) (reckless disregard for the copyright holder's

If Congress had intended the willfulness provisions of the ADEA to be applied more narrowly than courts have applied similarly worded statutes, it had "ways of doing so." *Screws v. United States*, 325 U.S. at 105. A finding of willfulness under each of these statutes enacted by Congress results in the imposition of a definitively greater legal sanction, yet nowhere has Congress either restricted the means of proof by a certain type of evidence, or dictated the quantum of the evidence necessary to support the predicate finding.

rights, rather than actual knowledge of infringement, suffices to warrant award of enhanced damages); *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1547 (Fed. Cir. 1987) (under Copyright Act, a finding of willful infringement depends upon the "totality of the circumstances"; finding of nonwillfulness supported by evidence of good faith); *United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir.), *cert. denied*, 397 U.S. 910 (1970) (under Selective Service Act, defendant charged with "willfully" or "knowingly" destroying government records was not entitled to an instruction requiring a finding of bad purpose or motive); *Wasson v. SEC*, 558 F.2d 879, 887 (8th Cir. 1977) (upholding conviction for willfully and knowingly selling unregistered securities under Securities Exchange Act of 1934, where defendant proceeded with the sale with "reckless indifference" to facts "suggesting the suspicious nature of the transaction"; defendant ignored the "obvious need for further inquiry"); *Hochstein v. United States*, 900 F.2d 543, 548 (2nd Cir. 1990), *cert. denied*, 119 S.Ct. 2967 (1992) (upholding finding of willful failure to pay withholding taxes; individual's bad purpose or real motive in failing to collect and pay taxes properly play no part in the civil definition of willfulness); *United States v. Hogan*, 861 F.2d 312, 316 (1st Cir. 1988) (jury entitled to consider defendant's negative attitude toward the IRS as an indication of willfulness; evidence of a personal philosophy and activity as a tax protester relevant to the question of willfulness); *Alabama Power Co. v. Federal Energy Regulatory Comm'n*, 584 F.2d 750, 753 (5th Cir. 1978) (willfulness under the Federal Power Act may be supported by evidence of "plain indifference" to requirements of the Act).

D. *A Majority of the Circuit Courts Adhere to the Thurston Standard in Cases of Individual Discriminatory Treatment.*

1. Adherence to the *Thurston* Standard is the Predominant Rule.

The First, Second, Fifth, Seventh, Ninth and Eleventh Circuits stand firmly for adherence to the principle that the *Thurston* definition of willfulness applies equally in the case of an individual and needs no gloss. *Benjamin v. United Merchants & Mfrs., Inc.*, 873 F.2d 41, 41-45 (2nd Cir. 1989); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1256 (2nd Cir. 1987); *Reichman v. Bonsignore, Brignati & Mazzota, P.C.*, 818 F.2d 278, 281 (2nd Cir. 1987); *Smith v. Great Am. Restaurants, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 646 (7th Cir. July 24, 1992) Nos. 91-1793 & 91-1864, 1992 WL 173234; *Brown v. M & M/Mars*, 883 F.2d 505, 512-514 (7th Cir. 1989); *Holzman v. Jaymar-Ruby, Inc.*, 916 F.2d 1298, 1304-1305 (7th Cir. 1990); *U.S. EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1458 (7th Cir. 1992); *Overgard v. Cambridge Book Co.*, 858 F.2d 371 (7th Cir. 1988); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1495-1496 (9th Cir. 1986); *Cassino v. Reichhold Chemicals Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099-1101 (11th Cir. 1987); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1544 (11th Cir. 1988); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1048 (11th Cir. 1989), *cert. dismissed by Westinghouse Elec. Corp. v. Verbraeken*, 493 U.S. 1064 (1990). *Formby v. Farmers & Merchants Bank*, 904 F.2d 627, 631-632 (11th Cir. 1990).¹²

¹² Even before this court's decision in *Thurston*, several circuit courts had addressed the issue of willfulness under the ADEA and how it should be defined in cases involving individual disparate treatment, and no court had adopted any test similar to that proposed by the petitioners here.

The petitioners assert that the Seventh Circuit departs from the *Thurston* standard, but the cited cases fail to support this. *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1224 (7th Cir. 1991), only requires that the plaintiff provide evidence beyond what is needed for an ordinary claim for age discrimination — but that is exactly what *Thurston* requires, that is, evidence of knowing or reckless disregard, which is not necessary to prove the underlying claim. The other, above-cited Seventh Circuit decisions all follow *Thurston* without a heightened standard. *Smith v. Great Am. Restaurants, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 646 (7th Cir. July 24, 1992) Nos. 91-1793 & 91-1864, 1992 WL 173234; *Brown v. M & M/Mars*, 883 F.2d 505 (7th Cir. 1989); *Holzman v. Jaymar-Ruby, Inc.*, 916 F.2d 1298 (7th Cir. 1990); *U.S. EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446 (7th Cir. 1992); *Overgard v. Cambridge Book Co.*, 858 F.2d 371 (7th Cir. 1988). And see *Burlew v. Eaton Corp.*, 869 F.2d 1063 (7th Cir. 1989).

Petitioners argue that the Fifth Circuit follows a similar test to that of the Third by requiring "egregious" conduct citing *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989). This analysis of the Fifth Circuit does not bear scrutiny. In *Hansard*

The First Circuit previously held that willfulness meant not just voluntary and intentional, but required specific intent "to do something the law forbids with bad purpose to disobey or disregard the law." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979).

Thurston itself arose out of the standard of the Second Circuit. *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2nd Cir. 1983). See *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 (2nd Cir. 1981). The Third Circuit (whose present standard the petitioners now propose) also adhered to a *Thurston* test. *Wehr v. Burroughs Corp.*, 619 F.2d 276, 281-283 (3rd Cir. 1980) (any conduct that is intentional, knowing or reckless should be considered willful). The Fourth Circuit adhered to an even less stringent standard, that an employer acts willfully if he knew or had reason to know that his conduct was governed by the act. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981).

the court held, after citing *Thurston*,¹² and the Circuit's prior decision in *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279 (5th Cir. 1986), that:

The evidence in this case was weak. There is simply no evidence that Pepsi's actions were so egregious as to justify finding a willful violation. *Hansard v. Pepsi Cola Metro. Bottling Co., Inc.*, 865 F.2d at 1470.

The court did not indicate that it was departing from *Thurston* in any way (though it may well have misinterpreted it) or that "egregious" was to be a new standard for individual cases, over and above the *Thurston* standard. The *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, citation was to an earlier Fifth Circuit decision, which had simply applied an unadorned, unglossed *Thurston* standard to an individual case. *Powell v. Rockwell Int'l Corp.*, 788 F.2d at 285-286. This same *Thurston* standard had previously been followed in another 1986 case, *Galvan v. Bexar County, TX.*, 785 F.2d 1298, 1307, *reh'g denied*, 790 F.2d 890 (5th Cir. 1986).

Two 1989 Fifth Circuit decisions demonstrate that *Galvan* and *Powell* are still followed, since each adheres to the basic unadorned *Thurston* formula. *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 410 (5th Cir. 1989); *cert. denied*, 490 U.S. 1098 (1989); *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 751 (5th Cir. 1989). The *Uffelman* court specifically rejected both the Tenth Circuit *Cooper* standard and, most significantly, the Third Circuit's *Dreyer* standard, stating, "[W]e believe it exceeds the *Thurston* standard." *Uffelman v. Lone Star Steel Co.*, 863 F.2d at 410 n.5.¹³

¹²As noted below, both the *Burns* and *Uffelman* courts found not only age discrimination violations, but also willful violations where the employees were terminated just prior (nine months in *Uffelman*) to the employees' pension vesting, which *Uffelman* also stated would even meet a standard of "outrageousness." *Uffelman v. Lone Star Steel Co.* at 410 n.5. *Burns v. Texas City Refining, Inc.*, 89 F.2d at 751-752 (here, as was Mr. Biggins, the employees were accused of "moonlighting," a charge the jury refused to believe and found pre-textual).

2. The Heightened Standards for Determining Willfulness Utilized by Some Circuits Are Illogical and Not Workable.

Some circuit courts have departed from the *Thurston* standard, but in doing so they have failed consistently to adhere to an alternative standard that is workable, or that permits an objective review based on a clear legal standard. They present a standardless, unpredictable, case by case approach, the results of which cannot be squared with the statute, *Thurston* or logic.

In 1986 in *Dreyer v. Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d 651 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987), the Third Circuit decided, despite *Thurston* and despite its prior decision in *Wehr v. Burroughs Corp.*, 619 F.2d 276, that in cases of individual disparate treatment on the basis of age, the statutory meaning of "willful" should be different, although the statute created no such distinction. The *Dreyer* court held that because the *Thurston* court stated that liquidated damages are punitive in nature, it should look to the RESTATEMENT OF TORTS standard for punitive damages as a guide, even though, the *Dreyer* court notes, *Thurston* implicitly rejected such an approach. *Dreyer*, 801 F.2d at 657.¹⁴ From this, the Circuit concludes that in cases of disparate treatment in a "discrete" employment situation,¹⁵ "there must be some additional evidence of outrageous conduct," and that "the appropriateness of the award will be depen-

¹⁴The court does not attempt to explain why reference to the RESTATEMENT OF TORTS would not have been equally appropriate in *Thurston* itself from which the court presumes to devise its rationale.

¹⁵The Third Circuit distinguished between cases involving the adoption of a policy, and those of an action directed at an individual. Presumably, however, "policies" sooner or later are directed at individuals. If a general policy were adopted for the purpose of discrimination against an individual (or a group of individuals), into which category would it fall?

dent upon an ad hoc inquiry into the particular circumstances." *Dreyer*, 801 F.2d at 658.¹⁶

Since *Dreyer*, the Third Circuit has indeed been forced to wade into "ad hoc inquiry into the particular circumstances," having had to decide thus far decide at least six additional cases, posing the question of what constitutes "outrageous" conduct meriting liquidated damages. *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 346-347 (3rd Cir. 1990) (proportionate loss of pension benefits not "outrageous"); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (3rd Cir. 1989) (requires harm beyond that normally associated with an employee's discharge and notes that it would be outrageous to ask an older employee to train his younger replacement); *Kelly v. Matlack, Inc.*, 903 F.2d 978, 981-982 (3rd Cir. 1990) (pretext and forcing the plaintiff to file suit to obtain remedy not "outrageous"); *Bartek v. Urban Redevelopment Auth. of Pittsburgh*, 882 F.2d 739, 744-746 (3rd Cir. 1989) (evidence that met *Thurston* standard not proof of outrageousness); *Anastasio v. Schering Corp.*, 838 F.2d 701, 706-707 (3rd Cir. 1988); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 771-772 (3rd Cir. 1989) (conditioning offer of another job on release of EEOC charge was "outrageous").

These cases show that this standard for "willfulness" is in fact unrelated to age discrimination in itself and dependent only upon how harshly the court feels the employer behaved. The oddest result comes in the *Bartek* case, where the Court held:

[A]lmost all of the evidence that Bartek contends is demonstrative of outrageous conduct actually per-

¹⁶ The petitioners fail to point out that *Dreyer* further states that "termination of an employee at a time that would deprive him or her of an imminent pension might show the outrageousness of conduct that would warrant double damages." *Dreyer*, 801 F.2d at 658. This of course is exactly what occurred in this case. Consequently, the primary authority on which the petitioner relies specifically adheres to a standard which requires a finding in favor of Mr. Biggins and accepts loss of a pension benefit as evidence of age discrimination.

tains to the "knew or showed reckless disregard" standard of *Thurston* and thus is *not germane to this case*. (*Bartek v. Urban Redevelopment Auth. of Pittsburgh*, 852 F.2d at 745 (emphasis supplied)).

In other words, the standard the Third Circuit uses allegedly to adhere to *Thurston's* principles renders *Thurston* irrelevant.

Given the confused and bizarre nature of these results, it is not surprising that one Third Circuit judge has stated, with respect to this willfulness standard, that it is "much easier to state than to apply to the variety of factual settings coming before the court." *Kelly v. Matlack, Inc.*, 903 F.2d at 987 (Seitz, J., dissenting).¹⁷

Three other circuits have departed from the *Thurston* formulation for willfulness in cases involving individuals, the Sixth, Tenth and Eighth Circuits. Their attempts differ significantly from the Third Circuit's approach but have proven to be equally unworkable.

The Sixth Circuit has held that a defendant's conduct was willful only if age was the "predominant factor" in the decision to terminate the plaintiff. *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1164 (6th Cir. 1991).

The Tenth Circuit has sometimes followed this standard as well. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 636 (10th Cir. 1988); *Krause v. Dresser Industries, Inc.*, 910 F.2d 674, 678 (10th Cir. 1990). The Tenth Circuit has, however, not been able to adhere consistently to this standard and, more frequently than not, ignores it.¹⁸ In

¹⁷ In other contexts, this Court has recognized that the use of "outrageous" as a standard is dubious, as it is inherently subjective and dependent upon a juror's taste and views. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

¹⁸ Prior to *Cooper* the Tenth Circuit had adhered to the *Thurston* standard; *Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1546, 1547 (10th Cir. 1987); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1431 (10th Cir. 1985); *Smith v. Consolidated Mut. Water Co.*, 787 F.2d 1441, 1443 (10th Cir. 1986).

Anderson the court held that the evidence was just "too thin and circumstantial" to satisfy *Cooper*, without stating that age was not the predominant factor. *Anderson v. Phillips Petroleum Co.*, 861 F.2d at 636.¹⁹ In *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), the court found that the employer's conduct satisfied the "something more" requirement set out in *Thurston*, *Cooper* and *Anderson* and treated *Cooper's* test and *Thurston's* as one and the same. *Spulak v. K Mart Corp.*, 894 F.2d at 1159. Again in *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990), the court said the predominant factor test was not met because the evidence was too thin and "something more" was required. *Krause v. Dresser Industries, Inc.*, 910 F.2d at 678. Clearly this standard presents the same problems as the Third Circuit's: the cases are in fact being decided on an ad hoc basis, rather than by any real governing standard.

Petitioners do not propose the "predominant factor" test of the Sixth and Tenth Circuits, but claim it "echoes" the Third Circuit's "outrageousness" test.²⁰ There is, in fact, no connection. A "predominant factor" question goes solely to the question of the evidence of age motive itself, whereas "outrageousness" may be dependent upon extraneous matters which might have nothing to do with the underlying violation itself.

Other Courts have had difficulty when they have sought to depart from the *Thurston* standard.

The Fourth Circuit offers still another "heightened" standard of unknown proportions. The court apparently admits that it

¹⁹ *Anderson* also specifically rejected the outrageous conduct standard of the Third Circuit. *Anderson v. Phillips Petroleum Co.*, 861 F.2d at 636.

²⁰ In fact, petitioners attempt their own "interpretive gloss" by proposing the additional standards of "repeated" "without colorable justification or otherwise harsh." There is no authority for these propositions in any court. It seems symptomatic of attempts to "put a gloss" on *Thurston* (and the statute) that the proposed formulations are almost as numerous as the courts and parties who have attempted them.

is acting on an ad hoc, case by case basis without a governing definition of "willfulness." *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989) (stating that the *Gilliam* court failed to offer an all inclusive definition of "willfulness"). *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390 (4th Cir. 1987).

The Eighth Circuit presents similar confusion. The Eighth Circuit has stated that it adheres to the "direct evidence" test, while at the same time holding that "an employer's concealment may provide evidence that the employer knew its conduct violated the ADEA." *Brown v. Stites Concrete Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 614 (8th Cir. July 15, 1992) Nos. 91-2591, 91-3057 & 91-3139, 1992 WL 161417 (the court also specifically rejected the Third Circuit standard),²¹ citing *Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 471 (8th Cir. 1989). Previously, the Eighth Circuit had sometimes adhered to the *Thurston* standard without requiring "direct evidence." *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988); *Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470-471 (8th Cir. 1989); *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987) and see *Rademaker v. Nebraska*, 906 F.2d 1309, 1313 (8th Cir. 1990) (requires additional evidence beyond what is needed to prove the underlying case).²²

At other times, the court has held that *Thurston* means "at least" that if there is "direct evidence" the "trier of fact may properly find willfulness." *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989); *Beshears v. Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991); and see *Morgan v. Arkansas Gazette*, 897 F.2d 945, 952 (8th Cir. 1990). It is difficult to

²¹ Concealment was present in this case when, petitioner provided false information, under oath, to the state claiming Mr. Biggins had "voluntarily quit." (See *infra* Add. to Brf. A.1.) See *Benjamin v. United Merchants & Mfrs., Inc.*, 873 F.2d 41, 44-45 (2d Cir. 1989).

²² This point seems self evident and is not an addition to *Thurston* in any sense, as *Thurston* obviously requires evidence of knowing or showing "reckless disregard," which is not needed to prove the underlying case.

conclude from these cases that the Eighth Circuit has adopted any consistent workable standard when it has sought to depart from *Thurston*.²³

If a "direct evidence" test does exist, it is no more logical or supported by the statute than the outrageousness test. There is no recognized principle of statutory construction which allows the type of evidence used to prove the cause of action to define its meaning. Nor is there any reason why "direct evidence" should stand on any higher ground than any other admissible form of evidence. This Court has held that courts should not treat discrimination differently from other ultimate questions of fact by requiring direct evidence of discriminatory intent and that a plaintiff may prove his case by direct or indirect evidence. *U.S. Postal Service Bd. v. Aikens*, 460 U.S. at 716-717.

What the "direct evidence," "predominant factor," "outrageousness" and "egregious" tests do have in common is their failure to give the reviewing court a workable standard beyond a subjective analysis of the nature and quantum of the evidence.

E. Petitioners' Actions Were Willful Violations of the Law.

In the present case, the plaintiff's evidence clearly satisfies any of the present circuit court standards as well as the *Thurston* standard utilized by the First Circuit.

In an attempt to bring this Court into a review of the evidentiary record in this case, petitioners argue that there was no "probative" evidence warranting the award of liquidated damages, (Pet. Brf. 47), and they further argue that even the application of *Thurston* would not justify the imposition of

²³ Petitioners argue that the district court acted properly in reversing the jury's willfulness finding (Pet. Brf. 35) but do not propose the district court's rationale which is based on *Neufeld*.

liquidated damages (Pet. Brf. 49).²⁴ The former argument is based on the petitioners' own factual conclusion that Hazen was justified in its treatment of Mr. Biggins, because "Biggins was marketing the services of another company to Hazen Paper competitors." (Pet. Brf. 47). The jury, charged under the standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), reached the very different conclusion, that this justification was a pretext for the age discrimination suffered by Mr. Biggins. There was considerable evidence to justify this conclusion: the businesses in question were operated by and for the benefit of Mr. Biggins' son, who did all the work (J.A. 84, 123-127), one of the businesses had been defunct for two years (J.A. 79), and Mr. Biggins had previously disclosed the businesses to Thomas Hazen. (J.A. 80).²⁵

The evidence demonstrated a calculated and deliberate effort on the part of the petitioners to treat Mr. Biggins differently from younger employees and to use his age (and the significance of his benefits and pension status to someone of his age) as a negotiating weapon and, ultimately, the vehicle for his termination and replacement by a younger employee. In order to conceal their behavior, the petitioners then used false and perjured information to try to deny Mr. Biggins his unemployment compensation. (See *infra* Add. to Brf. A-1.)

This kind of deliberate action, flaunting not only the ADEA, but the prohibitions of ERISA and the state's unemployment procedures (while also engaging in fraud) demonstrates a deliberate, intentional scheme to avoid the dictates of the law,

²⁴ This Court has indicated that, where the proper standard is applied, its role is not to weigh evidence to determine willfulness. *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 135 n.14.

²⁵ Petitioners' suggestion that Mr. Biggins and the Hazens simply had a dispute about compensation ignores the fact that the jury found that the stock compensation had already been promised Mr. Biggins, and that the Hazens were guilty of fraud after not providing it.

to damage Mr. Biggins because of his age, and subsequently to conceal those actions.

This evidence of willfulness would be satisfactory under any of the various circuits' standards now at issue. Indeed every court which has addressed the subject has concluded that termination of an employee just prior to his pension vesting constitutes outrageousness. *Dreyer v. Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d at 658; *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d at 1466; *Uffelman v. Lone Star Steel Co.*, 863 F.2d at 410 n.5.

Clearly, too, age was the predominant factor in Mr. Biggins' dismissal. The Circuit Court found that age was "inextricably intertwined with the decision to fire Biggins." (Cert. Pet. A-14.) Given that the justification for the Hazens' action was found to be pretextual, no other reason exists for their actions, except reasons of age. Therefore, even the tests of the Sixth and Tenth Circuits are satisfied. See *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988).

Petitioners lastly argue that even under an unmodified *Thurston* standard, willfulness could not have been found here because the alleged "pension as proxy" reasoning of the First Circuit could not have been divined by the Hazens. (Pet. Brf. 49). This argument is based on the completely false premise that the courts below found discrimination solely on the basis of interference with pension vesting which simply does not conform to the actual evidence and lower court opinions. (See *infra* pp. 33-36). This is not simply a matter of the relationship between Mr. Biggins' age and pension status, but of intentional disparate treatment ostensibly justified by purely pretextual reasons, followed by illegal attempts to conceal. In such circumstances, there was no need to divine anything about theories of age proxies. The petitioners assertion that "an

employer's good faith belief that his actions comply with the statute clearly precludes the imposition of liquidated damages" (Pet. Brf. 49) is as true as it is irrelevant, for the petitioners offered not one shred of evidence that they were acting under a good faith belief that they were complying with the law. The petitioners engaged in a deliberate and calculated scheme that extended to fraud and false statements under oath before the state unemployment division. (See *infra* Add. to Brf. A-1.) Their actions were neither innocent nor unsuspecting.

II. THE DISTRICT AND CIRCUIT COURTS' FINDING OF LIABILITY UNDER THE ADEA SHOULD BE AFFIRMED.

A. The Courts Below Did Not Improperly Equate Pension Interference With Age Discrimination.

Petitioners initially sought review on the question of "whether an employer's interference with an employee's pension vesting, in a plan where benefits vest after ten years of service and are not based on age, violates the Age Discrimination in Employment Act." (Cert. Pet. p. i). In and of itself, that question cannot be directly addressed on the facts of this case because, aside from the evidence of pension interference, there was substantial other evidence of age discrimination. The plaintiff and respondent, Walter Biggins, was sixty-two years old at the time of his discharge. The respondent alleged, and the jury, the district court and the Circuit Court found age discrimination, based on several factors, only one of which was that his termination for pretextual reasons, at age sixty-two, occurred just prior to his pension vesting.

The evidence of age discrimination presented to the jury at trial centered on the circumstances surrounding Mr. Biggins' termination. The disparate treatment of Mr. Biggins included

the petitioners' attempt to force upon him a discriminatory confidentiality/patent agreement not required of similarly situated younger employees (J.A. 85-86), the fabrication of a pretextual reason (disloyalty) for his termination, the offer of a consulting role which deprived him of all employee benefits while still retaining his services, critical comments concerning his age, and his replacement by a thirty-five year old who received far more favorable treatment on the very same matters. Further, Thomas Hazen offered to negotiate with Mr. Biggins over his pension. These "offers," all stick and no carrot, suddenly were made to Mr. Biggins when he was on the verge of his pension vesting. (J.A. 111).²⁶

Mr. Biggins was then terminated just prior to the time he would have vested and been eligible for benefits.²⁷ The pension interference was presented as evidence of a calculated scheme of age discrimination and not as a proxy for age discrimination in itself.²⁸

Contrary to petitioners' assertions, each of the courts below, in affirming the jury's verdict, clearly demonstrated their reliance on the multiple acts of age discrimination engaged in

²⁶ The timing of events was a critical factual issue because the petitioners' asserted justification for their actions was their supposed "outrage" over Mr. Biggins' "disloyalty." One factor the jury certainly considered in rejecting petitioners' assertion of disloyalty and accepting Mr. Biggins' testimony that he had received permission from Thomas Hazen for his limited involvement with his son's business venture was that the Hazens were aware of these "facts" in April, yet waited six weeks, until the eve of Mr. Biggins' pension vesting, to convey their alleged "outrage." (J.A. 80, 148-151).

²⁷ As the United States correctly points out in its amici curiae brief, nothing in the judge's instruction could have led the jury to conclude that a termination to prevent the vesting of pension rights required a finding of an ADEA violation. (Brief for the United States 22 n.18). Conversely, petitioners did not request any jury instruction that a termination to prevent the vesting of a pension could not be evidence of age discrimination or that it could only be considered under ERISA, as they now argue.

²⁸ Mr. Biggins, once vested under the terms of the pension plan, would have been eligible for immediate benefits *because of his age* (over sixty). (J.A. 182).

by the petitioners, which were unrelated to pension interference. The district court went on at length in its opinion, reciting this evidence, and specifically stated that discharge "in order to eliminate the employee's pension rights cannot by itself establish age discrimination" but provides some proof of it. The district court concluded that "based on the evidence adduced at trial and reasonable inference drawn therefrom, the verdict as to age discrimination will stand." (Pet. App. A-57).

Petitioners assert that the Circuit Court made a "formulation that pension status is inextricably intertwined with age" (Haz. Brf. 28), and that the Circuit Court created a "per se rule equating pension status with age" as the "linchpin" of its decision. (Haz. Brf. 14). Petitioners are twisting the Circuit Court's words. What the Circuit Court actually stated was:

The jury could also have reasonably found that *age* was inextricably intertwined with the *decision* to fire Biggins. (Pet. App. A-14) (emphasis supplied).

This conclusion by the Circuit Court followed a three-page review of all factors, including those unrelated to pension interference but which constituted evidence of age discrimination. Based upon these multiple factors, the Circuit Court concluded:

Based on our review of the evidence²⁹ we find that it was within the province of the jury to decide whether age was a determining factor in the defendants' decision to terminate Biggins' employment. (Pet. App. A-14).

²⁹ This review included the critical comments about Mr. Biggins' age by the Hazens (Pet. App. A-12), the confidentiality agreement (Pet. App. A-13), the hiring of a younger successor (Pet. App. A-13), the disparate treatment of the younger successor (Pet. App. A-13), the absence of such an agreement for any other employee while Biggins was there (Pet. App. A-13), and the fact that Mr. Biggins was sixty-two years old and close to vesting (Pet. App. A-13), together with the offer of a consulting position with its consequent loss of benefits. (Pet. App. A-14).

Therefore, if pension interference as a "proxy" for age discrimination is the issue petitioners present, then this case is inappropriate for its resolution, because there was other independent evidence of age discrimination which the jury relied on, and because the issue was never raised in the courts below.

B. Petitioners Raise Evidentiary Issues Not Raised or Preserved Below.

In their brief, the petitioners alter the question presented to now state: "[W]hether the Courts below erred in sustaining respondent's claim . . . where the finding of age discrimination was based upon the logically irrelevant issue of pension vesting, and not upon considerations of age?" (Haz. Brf. i). This question still includes the misconception that the lower courts were not relying on evidence of age discrimination, separate from interference with pension status. The petitioners now argue that interference with pension vesting (and indeed any matter relating to discrimination on the basis of seniority or other benefits) cannot be considered evidence of age discrimination.

If the issue petitioners wish to present is whether interference with pension vesting can ever be considered as evidence of age discrimination, that issue was not raised and was not properly preserved below. Petitioners never objected to the introduction of this evidence at trial on the ADEA claim and never requested any limiting jury instruction that the evidence should not be considered on the ADEA claim.³⁰ Furthermore, petitioners have never argued at any stage of the proceedings, including in their motions for directed verdict and judgment not-

³⁰ While this evidence was certainly relevant to Mr. Biggins' ERISA claim, petitioners never objected to its introduction with respect to the ADEA count or asked for any instruction distinguishing the evidence between the two counts. Nor did they ever request a bench trial on the ERISA claim in order to separate the issue from jury consideration.

withstanding the verdict, and in their appeal to the Circuit Court, that evidence of interference with pension vesting could not be evidence of age discrimination under the ADEA. (J.A. 188-192). This failure renders the question inappropriate for review. See *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-259 (1987); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

C. Interference With Pension Vesting is Permissible Evidence of a Violation of the ADEA.

Even if the failure to raise this issue below did not make the matter inappropriate for review now, petitioners' assertion that interference with pension vesting cannot constitute evidence of age discrimination is clearly wrong and contrary to the overwhelming weight of authority. Every circuit court which has considered the question has ruled that evidence regarding the timing of the vesting of pension benefits can be evidence of age discrimination in a termination. *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 62 (3rd Cir. 1988) (discharge motivated by desire to avoid increased benefits payable after thirty years of service violates the ADEA); *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461, 1466 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989) ("Hansard's termination only seven months before his pension benefits were to vest also supports his claim of age discrimination"); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1421 (7th Cir. 1992) ("[T]he evidence of timing in relation to vesting of pension benefits can be evidence of age discrimination.")³¹ See also *Benjamin*

³¹ Petitioners cite *Wheeldon v. Monon Corp.*, 946 F.2d 533 (7th Cir. 1991) as rejecting a correlation between pension status and age while conceding it held that pension may be used as a proxy for age. (Pet. Brf. 29). *Wheeldon* involved the employee's military pension and not the employer's own pension plan.

v. United Merchants & Mfrs., Inc., 873 F.2d 41 (2nd Cir. 1989) (determination of age discrimination was supported by evidence that employee who had vested in pension plan had been replaced by younger employee not vested in plan); *Dreyer v. Arco Chemical Co., Div. of Atlantic Richfield Co.*, 801 F.2d 651, 658 (3rd Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) (termination of employee to prevent vesting of pension benefits would be sufficiently "outrageous" conduct to justify a finding of willfulness.)¹² *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 751-752 (5th Cir. 1989) (decision to replace employees because of their age done before one of the employee's pension vested supported jury's finding of willful violation of the ADEA). Cf. *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1165 (7th Cir. 1992) (cutting vacations of older workers as a way of prodding them to take early retirement under early retirement plan designed to induce older workers to leave would be deliberate discrimination and clearly actionable).¹³

Nor does *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc), support the petitioners' position, for there the court held only that knowledge of pension status alone could not prove age discrimination. *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d at 658. See *Castleman v. Acme Boot Co.*, 959 F.2d at 1421 n.2.

Of course it is true in a theoretical sense that service-based pension status and age are not necessarily connected, and that an employee in his thirties could well be the victim of pension inference. However, this is not a theoretical case but a real one, that involves an individual who was sixty-two years old,

¹² Petitioners rely on *Dreyer* and *Hunsard* in advancing their standards of outrageousness or egregiousness but ignore their statement that interference with pension vesting could constitute willful age discrimination.

¹³ Some district courts have found termination prior to vesting to be sufficient in and of itself to prove age discrimination. *Bishop v. Jelleff Assocs.*, 398 F. Supp. 579, 589 (D.D.C. 1974); *Dean v. Allegheny Int'l*, 47 Fair Empl. Prac. Cas. (BNA) 1879 (N.D.Ill. 1988) No. 86 C 10187, 1988 WL 26872.

a fact well known to the petitioners.¹⁴ Respondent has never argued that pension interference equals age discrimination in all situations or that its existence in this case was itself the only basis for a finding of age discrimination.

Petitioners' discussion of whether the ADEA governs decisions based solely on seniority, or pension status, is meaningless in the context of a situation such as here, where benefits and pension status were used as weapons against Mr. Biggins, because he was sixty-two years old and therefore perceived as being vulnerable to pressure concerning these points. An employee at sixty-two has greater interest in his benefit and pension status than does a younger employee. The older worker may be more likely to face illness or imminent retirement or may not be able to work sufficient time in another job to vest in a pension if he were terminated. On its face the ADEA prohibits discrimination in all aspects of the employment relationship, making it unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (a)(1). There is no exclusion for pensions in this prohibition. This evidence, therefore, was properly credited by the courts below.

D. A Concurrent Violation of ERISA Does Not Prevent Recovery Under the ADEA.

Petitioners argue that the availability of an ERISA remedy for interference with pension vesting "militates" against construing the ADEA to reach such conduct (Pet. Brf. 33).

¹⁴ The Hazen pension plan permitted Mr. Biggins to draw on his pension fund anytime after he was sixty and his rights were vested. Therefore as Mr. Biggins was sixty-two he could have taken benefits immediately if he was terminated after his pension rights vested. As it was, the Hazens turned him out with nothing.

This remarkable proposition, notably absent from ERISA itself, or, for that matter, the ADEA, is not supported by any authority or compelled by the logic of the statute. Petitioners rely on *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985), which was an ERISA case, on the availability of punitive damages under ERISA; and on *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 97 (1981), which only involved a question of remedies available under Title VII and The Equal Pay Act. This case does not present a question of what remedies are available but, even under petitioners' distorted presentation, concerns a question of substantive coverage of the ADEA.

This case does present the unremarkable proposition that, in some circumstances, an injured person may be able to avail himself of the protection of two federal laws intended to prevent unlawful discrimination in the workplace. Petitioners cite *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). There the Court approved the concept that there could be overlapping coverage between §1981 and Title VII, while also holding that some conduct was not covered by both statutes, because, to reach the conclusion that all conduct was covered by both, the Court would have to adopt a "tortuous construction" of the statute beyond its plain meaning. *Patterson v. McLean Credit Union*, 491 U.S. at 181. No such tortuous construction is being attempted here, where the plaintiff presented the pension-related actions as evidence of age-discrimination which the ADEA bans on its face.

There is nothing unusual about a result where discrimination under one statute is also discrimination under another. Congress has frequently passed overlapping statutes in the civil rights area. The Equal Pay Act prohibits discrimination in wages on the basis of sex, and the subsequent broader sex discrimination provisions of Title VII also prohibit this. See 29 U.S.C. § 206(d), 42 U.S.C. § 2000e-2(a)(1). Title VII pro-

hibits national origin discrimination, and the subsequent Immigration Reform and Control Act prohibits the same discrimination. 42 U.S.C. § 2000e-2(a)(1), 8 U.S.C. § 1324(b).

E. There Was Sufficient Evidence to Support a Finding That Respondent Was Dismissed In Order to Prevent His Pension From Vesting.

Petitioners also attempt to present the additional and separate issue of whether the evidence itself was sufficient for the jury to find that Mr. Biggins was dismissed in order to prevent his pension rights from vesting.

This issue was not itself presented in the Petition for Certiorari, and it is presumably now presented on the incorrect assumption that the Circuit Court based its decision solely on evidence of interference with pension vesting.

In any event, the petitioners' attempt to present the evidence in a light most favorable to them is wholly without merit.

The assertion that the "only evidence" was Thomas Hazen's "arguable" knowledge of Mr. Biggins' pension status is simply false.¹¹ *Visser v. Packer Eng'g Assocs.*, 924 F.2d 655 (holding

¹¹ Petitioners claim that the district court noted, "Mr. Hazen appeared to be under the impression that Biggins had already achieved full vesting under the plan." (Pet. Brf. p. 25 n. 20). This is wrong on three counts. First, this is certainly and obviously not what the district court stated in its note 4 (Pet. App. A-63). The district court noted only that during the litigation, respondent had discovered a clause in the summary description of the plan which appeared to indicate that Mr. Biggins should have vested almost a year before his termination, even though the company had told him he was not vested. (Pet. App. A-63). At trial, Thomas Hazen did not claim that he believed this, rather he foreswore any knowledge of the provision. (J.A. 157-158). The district court cited Thomas Hazen's testimony in note 4 only because Hazen was asked on cross examination to read the provision in question. (J.A. 157, 158). To suggest now, as petitioners do, that it was Thomas Hazen's testimony that he believed Mr. Biggins was vested is plainly false. Finally, petitioners in all their pleadings specifically denied Mr. Biggins was entitled to any pension benefits and appealed his verdict on that issue to the Court of Appeals. Not an insignificant amount of time and money, one must assume, was spent fighting to deny Mr. Biggins a benefit that petitioners now suggest Mr. Hazen believed had already vested in Mr. Biggins.

that knowledge of pension status alone is insufficient), has no relevance here. Not only was Thomas Hazen aware of Mr. Biggins' pension status, he used it to his advantage, submitting a discriminatory confidentiality agreement to Mr. Biggins on the eve of his vesting. When Mr. Biggins agreed to sign the agreement, provided his compensation be included (J.A. 86-87), the Hazens took a different tack and suggested Mr. Biggins become a consultant. (J.A. 87). Contrary to petitioners' argument, the record is rich in evidence that such a status would have deprived Mr. Biggins of his pension. Under the pension plan, only employees could participate in the pension plan. (J.A. 161, 181-182). Hazen had several consultants in other areas, none of whom received any benefits or participated in the plan. (J.A. 160-161). The jury could have reasonably inferred that Thomas Hazen's statement about an agreement to "cover" Mr. Biggins' pension rights was a not so subtle reminder to Mr. Biggins of his precarious pension situation, and that the separation agreement would "cover" the subject by eliminating Mr. Biggins' pension. The evidence demonstrated calculated use of Mr. Biggins' age and pension status as weapons against him.

In truth, petitioners are simply seeking to obtain through the back door another review of the evidence in this case, the factual disputes of which were long ago decided by the jury. Two courts have patiently and thoroughly reviewed the evidence. There are no grounds to drag this Court through still another review.

Conclusion.

For all of the reasons outlined above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Date: September 4, 1992

Addendum.

Add. A-1

PLAINTIFF'S TRIAL EXHIBIT 18

JOB INSURANCE

REQUEST FOR SEPARATION AND WAGE INFORMATION - NEW CLAIM RETURN

COMPLETED FORM TO: Commonwealth of Massachusetts
Division of Employment Security
136 Worthington St, PO Box 640
Springfield MA 01101

Seq	Social Security No.	Date of Claim
001	030-12-8123	06-22-86
Filing Date	Mailing Date	Sex
06-25-86	06-26-86	M
	IP	Employer ID No.
05-29-25	Y	00-307130

CLAIMANT NAME AND ADDRESS:	EMPLOYER NAME AND ADDRESS:
Walter F. Biggins	Hazen Paper Co.
52 Redfern Dr.	Foot of Jackson Street
Longmeadow, MA 01106	Holyoke, MA 01401

PART I

A. PERIOD LAST EMPLOYED: FROM _____ THROUGH _____

B. SEPARATION REASON:

Lack of Work ☐

Voluntary Quit ☒

Discharge ☐

Labor Dispute ☐

Other ☐

C. SEPARATION IS:

Permanent ☒

Partial ☐

Temporary ☐

Recall Date _____

EMPLOYER CERTIFICATION: These are true statements to the best of my knowledge and belief under the penalties of perjury.

Signature: s/ Rossmeisl

Title: Controller

Dated: June 30, 1986

Tel: (413) 538-8204

D. GROSS WAGES PAID DURING 52 WEEK BASE PERIOD

Quarterly Periods	Gross Wages Paid	Date Started	Date Stopped
From To			
06/23/85 06/30/85	\$ paid on monthly basis		
Qtr. Ending 09/30/85	\$17,256.00	07/1/85	09/30/85
Qtr. Ending 12/31/85	\$17,556.00	10/1/85	12/31/85
Qtr. Ending 03/31/86	\$23,656.00	01/1/86	03/31/86
04/01/86 06/21/86	\$19,336.00	04/1/86	06/21/86
TOTAL PAID	\$77,804.00		

(14)
No. 91-1600

Supreme Court, U.S.

FILED

SEP 30 1992

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONERS

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In the Supreme Court of the United States

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v.

WALTER F. BIGGINS,
RESPONDENT.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONERS

ARGUMENT

I. THE FIRST CIRCUIT'S RULING ON UNDERLYING ADEA LIABILITY IS ERRONEOUS AS A MATTER OF LAW

In the case at bar, and indeed as the briefs of Respondent and his supporting amici curiae¹ themselves make clear, Biggins'

¹ For ease in reference, the amici curiae United States and Equal Employment Opportunity Commission will hereinafter be referred to as the "Solicitor General". Likewise, the amicus curiae National Employment Lawyers Association will be referred to as the "NELA"; and the amicus curiae American Association of Retired Persons will be referred to as the "AARP".

ADEA claim rests upon both an illegitimate legal theory and an inadequate evidentiary foundation. The Court of Appeals' holding that an intent to defeat service-based pension vesting constitutes evidence of age discrimination is clearly erroneous as a theory of ADEA liability. By the same token, Respondent's alternative contention that the decision of the First Circuit may be sustained on the basis of "other" evidence asks the Court to rest a finding of age bias on evidence that will simply not support such an inference.

A. Pension Interference Is Not Age Discrimination

For the reasons fully set forth in Petitioners' principal brief to this Court (at pp. 27-35), the evidence provides no support for the First Circuit's decision to substitute pension interference as a proxy for age under the ADEA. Even if the record permitted the inference that the Hazens were specifically motivated to discharge Biggins from employment to prevent his pension rights from vesting, which it does not,² such an inference will still not carry Respondent's burden to demonstrate that his discharge from employment was more likely than not motivated by age bias.

Biggins provides no analytical basis for sustaining the First Circuit's holding that a discharge intended to defeat an employee's seniority-based pension vesting constitutes age discrimination. As Petitioners have argued, considerations of seniority and age are analytically distinct, and cannot be substituted for one another when applying the liability provisions of the ADEA. See Brief of Petitioners, at p. 33 and n.27. See also *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 and n.38 (5th Cir. 1991) ("[Plaintiff's] assertions that he was

² The contention that Thomas Hazen's offer of a consulting agreement that would cover pension rights might somehow have been construed by the jury as a "not so subtle" threat to *eliminate* Biggins' pension, see Brief of Respondent at p. 42, tortures the evidence and subordinates reasonable inference to nonsensical speculation.

told his long seniority and greater severance pay benefits affected the company's decision to terminate him ... are not relevant to age discrimination Seniority and age discrimination are unrelated.") (citation and quotations omitted).³

The undisputed evidence makes clear that pension vesting at Hazen Paper was a matter wholly unrelated to age, and the Court of Appeals' decision to treat the two as interchangeable

³ The issue is not, as Respondent has argued, whether interference with pension vesting can ever be probative of age discrimination. Rather, the issue before this Court is whether, *on the facts of the case at bar*, pension interference was properly made the basis for ADEA liability. This is precisely the question which Petitioners submitted to the Court in their Petition for Writ of Certiorari, and the suggestion by Respondent that Petitioners have somehow "changed" the issue is bewildering. Nor did Petitioners waive the question presented in their certiorari petition by failing to assert it below. Petitioners consistently maintained both in the District Court and the Court of Appeals that the evidence was legally insufficient to sustain a finding of age discrimination. Further, in response to the Court of Appeals' novel decision equating pension status with age for purposes of ADEA liability, Petitioners requested both rehearing and reconsideration *en banc*, briefing the *identical* question they subsequently presented to this Court. The issue has thus unquestionably been preserved for review. See *Stevens v. Department of Treasury*, 111 S. Ct. 1562, 1567 (1991) (where the Court of Appeals entertained and "decided the substantive issue presented," party's failure to raise issue in lower court will not give rise to waiver); *Fernandez v. Carrasquillo*, 146 F.2d 204, 206 (1st Cir. 1944) ("When the petition for rehearing is thus considered and disposed of on the merits it has been 'entertained' by the court although the court may deny the petition without setting the case down for reargument and without any written opinion. ... The United States Supreme Court treats the entry of such an order denying rehearing as 'entertainment' of the petition. ...").

It is, ironically, Respondent himself who is attempting to advance for the first time a contention that he failed to raise earlier. A review of Respondent's Brief in Opposition finds that Respondent raised no waiver argument in opposing certiorari, thus rendering such argument waived going forward. See *City of Canton v. Harris*, 489 U.S. 378, 384-85 (1989) (rejecting waiver argument as untimely where not raised in opposition to petition for certiorari); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985) (waiver argument not raised in opposition to petition for certiorari held waived: "nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari") (emphasis in original).

is manifest error. Indeed, the Solicitor General virtually concedes such error in his brief as *amicus curiae*. See Brief of the Solicitor General, at pp. 23-25 ("Where, as here, the only criterion for vesting under a pension plan is a reasonably short period of service, and an employee's age is not a factor, there is little ground for inferring that an employer's intention to prevent an employee's pension from vesting is related to age.")⁴

Recognizing that age and pension status had nothing to do with one another in this case, Respondent offers the elliptical theory that Petitioners "used" his pension status as a "weapon" against him in their dispute over a confidentiality agreement, and that this amounted to age discrimination because older persons are more concerned with pension benefits than younger persons. See Brief of Respondent, at pp. 31, 39, and 42.⁵

⁴ Eager to divorce Respondent's ADEA claim from the insupportable logic adopted by the courts below to sustain it, the Solicitor General has suggested that neither the District Court nor the First Circuit found the alleged intent of the Hazens to interfere with Biggins' pension vesting to be "determinative" to the viability of the claim. See Brief of the Solicitor General, at p. 24. (Respondent likewise insists that the courts below affirmed the ADEA verdict through "reliance on the multiple acts of age discrimination engaged in by the petitioners, which were unrelated to pension interference." See Brief of Respondent, at pp. 34-35.) This is clearly not so. Both the District Court and the Court of Appeals *explicitly* relied on perceived pension interference to uphold the jury's ADEA verdict. See Cert. Pet. A-56 (District Court approving ADEA verdict by ruling that "the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights"); see also Cert. Pet. A-14 (First Circuit affirming ADEA liability because "the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end").

⁵ Respondent appears to concede that pension interference is not discriminatory in *every* case, but claims that it was so in this instance because Biggins was 62 years old. Thus, Respondent asserts:

"[W]hether the ADEA governs decisions based solely on seniority, or pension status, is meaningless in the context of a situation such as here, where benefits and pension status were used as weapons against Mr. Biggins, because he was sixty-two years old and therefore perceived as being vulnerable to pressure concerning these points. An employee at

Respondent's rhetoric, however, lacks anything even remotely resembling an evidentiary basis. Biggins' extraordinary theory of age discrimination rests upon *assumed* propositions which (as his brief tellingly reflects) cannot be supported with either a single reference to the trial record or a single legal citation. Not one. Indeed, the core of Biggins' argument — *viz.*, that an older worker is "more vulnerable" and has a "greater interest in his benefit and pension status" because he "may be more likely to face illness or imminent retirement or may not be able to work sufficient time in another job to vest in a pension" — posits the very kind of ageist stereotypes decried by the AARP, and should not be credited by this Court.

Furthermore, Respondent's apparent premise, *i.e.*, that a confidentiality agreement required of a 62 year old employee is somehow "discriminatory" because such an agreement visits a relatively greater burden upon him owing to the "particular value" older employees place on pension benefits, is itself open to serious doubt as a basis for ADEA liability. See *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163-65 (7th Cir. 1992) (noting that wage and benefit reductions "unquestionably hit TWA's older workers harder", but rejecting this as a basis for ADEA liability). As the Solicitor General concedes (at p. 24 of his brief), the fact that an employer's action may be burdensome to an older worker is, without more, no evidence that the employer was motivated to take the action *because* of such burden. It can equally be said that every discharge from employment falls more heavily on an older worker, in that it is likely to produce a greater loss of income, defeat more accrued seniority, and the like. Yet, to apply Respondent's logic, every discharge of an older employee could, by itself, be held to constitute age discrimination. The ADEA provides no basis for such a result.

sixty-two has greater interest in his benefit and pension status than does a younger employee. The older worker may be more likely to face illness or imminent retirement or may not be able to work sufficient time in another job to vest in a pension if he were terminated."

See Brief of Respondent, at p. 39.

B. The Remaining Evidence Is Not Probative Of Age Discrimination

Without conceding (as the Solicitor General does) that the theory of liability embraced by the First Circuit was erroneous as a matter of law, Respondent maintains that the jury's ADEA verdict can nonetheless be upheld on the basis of *other* evidence. Respondent is wrong. When pension interference is eliminated as a basis for ADEA liability, the remaining evidence permits no rational finding that Petitioners more likely than not discharged Biggins from the Company because of his age.

1. There Is No Evidence That The Hazens' Articulated Reason For Requiring Biggins To Sign A Confidentiality Agreement Was Pretextual

Throughout his brief, Respondent argues that the Hazens' articulated reason for requiring Biggins to sign a confidentiality agreement — viz., their discovery that he had, contrary to prior assurances, been personally marketing services of other businesses to competitors of the Company — was properly found by the jury to be a pretext. In support of this position, however, Biggins advances arguments which will not bear the weight of scrutiny.

First, Biggins suggests that a finding of pretext may be sustained on the mere supposition that the jury chose to "disbelieve" the Hazens' explanation for the proffered confidentiality agreement. This assertion is erroneous as a matter of law. It is well settled that a factfinder's possible disbelief of otherwise uncontradicted testimony will not provide an evidentiary basis for a contrary finding in favor of the party bearing the burden of proof. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958); *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951); *Roper Corp. v. NLRB*, 712 F.2d 306, 310 (7th Cir. 1983); *Federal Ins. Co. v. Summers*, 403 F.2d 971, 974 (1st Cir. 1968).

This principle is especially critical to an employment discrimination case, where the law requires the trier of fact to rest a finding of pretext on "substantial evidence" that the employer's articulated reason for action is more likely than not a cover-up for unlawful bias. *See Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2995 (1992). Accordingly, mere speculation that the jury might have disbelieved the Hazens' testimony will not, without more, suffice to carry Biggins' burden to establish age discrimination.

Respondent next attempts to rest an inference of pretext on the claim that he had informed Thomas Hazen of his son's businesses, and that Mr. Hazen had given Biggins his blessing. *See* Brief of Respondent, at pp. 5, 31, 34. This contention, however, plainly overlooks what is without question *the* essential fact at the heart of the case: the Hazens never knew, until just prior to presenting Respondent with their proposed confidentiality agreement, that Biggins was (contrary to his previous assurances) marketing professional consulting services to Hazen Paper competitors. The undisputed evidence reveals that Biggins was engaged in business ventures in which he personally called on competitors of Hazen Paper; that he did so without the knowledge or permission of his superiors at the Company; and that the fact of Biggins' unauthorized outside activities came to Thomas Hazen's attention only shortly prior to his insistence that Respondent sign a confidentiality agreement.⁶ The suggestion, therefore, that Petitioners previously approved the

⁶ Respondent's allegation that Thomas Hazen "waited six weeks, until the eve of Mr. Biggins' pension vesting" to express disapproval of Biggins' involvement with W.F. Biggins Associates, Inc. (*see* Brief of Respondent, at p. 34 n.26) is unsupported by the record. To the exact contrary, the evidence showed that Thomas Hazen confronted Biggins with his W.F. Biggins Associates brochure within *days* of receiving the brochure in late April, 1986 (JA 148); and that, thereafter, Mr. Hazen arranged his May 24, 1986 meeting with Respondent within days of confirming the fact that Biggins had personally engaged in business solicitations of a Company competitor named Roger Sullivan (JA 130-31, 149-51.) Respondent's claim of a delay in the Hazens' reaction to his misconduct is thus utterly without basis in the evidentiary record.

business activities which they claim to have prompted their decision to impose a confidentiality agreement on Biggins is simply fallacious.

Finally, Respondent charges that pretext can be located in Thomas Hazen's "lie" to the Massachusetts Division of Employment Security regarding Biggins' separation from the Company. See Brief of Respondent, at pp. 29 n.21, 31, 33. This allegation is specious. Thomas Hazen clearly had a good faith basis for asserting that Biggins' termination amounted to a "voluntary quit". By his own admission, Biggins could have retained his job at Hazen Paper had he not insisted on receiving \$100,000 in compensation as a precondition to signing a confidentiality agreement. See *Wagstaff v. Director of Division of Employment Security*, 322 Mass. 664, 79 N.E.2d 3 (1948) (denying benefits to claimant leaving work after being denied requested pay increase). Respondent's job with Petitioners was thus plainly his to keep, provided he covenanted not to aid competitors of the Company. Biggins simply refused, unless his salary were increased to \$100,000 per year. Under these circumstances, it was altogether reasonable for Thomas Hazen to treat Respondent's rejection of this condition of employment as tantamount to a voluntary resignation, and to contest his claim for unemployment benefits on that basis.⁷ See *W. Holloway & M. Leech, Employment Termination/Rights and Remedies* (1985) at p. 110 (discharge based on employee's refusal to obey "reasonable request" may be viewed as voluntary quit). Respondent's charge of dishonesty against Mr. Hazen simply cannot be supported by any reasonable view of the evidence; and, even if it could, such a charge would still not permit an inference of *age discrimination*.

⁷ Even Biggins himself testified that Thomas Hazen's *contemporaneous* assessment of the termination reflected his personal view that Biggins was not being discharged. See JA 88 ("He said, 'I am not firing you. I don't know what I'm doing to you, but I'm not firing you.'").

2. Requiring Respondent To Sign A Confidentiality Agreement Had Nothing To Do With Biggins' Age

Respondent insists that age discrimination can be inferred from the fact that the Hazens required Biggins to sign a confidentiality agreement which they did not impose on other (younger) employees. There was no evidence, however, that any other employee occupied the sensitive managerial position that Biggins did as Technical Director and a member of Hazen Paper's Executive Committee. Nor was there evidence that any other employee had ever marketed services of a company bearing his own name to competitors of Hazen Paper. Since the conflict of interest posed by Biggins' competitive business activity was the very reason given by Petitioners for their decision to impose a confidentiality agreement upon him, the fact that younger employees not shown to occupy like positions or to have engaged in like behavior were not required to sign such an agreement is in no way probative of age bias. See *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981) ("it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally") (emphasis added); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992) ("It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly situated in all respects") (emphasis in original); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1315 (5th Cir. 1986) (same); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (same).⁸

⁸ Even the Solicitor General appears to recognize the immateriality of the Hazens' failure to require confidentiality agreements of other technical employees not engaged in business activities with competitors, tentatively describing such evidence as "arguably differential treatment of younger employees." See Brief of the Solicitor General, at p. 24. This noncommittal characterization aligns with the Solicitor General's overall view of Biggins' evidence of age discrimination as "not strong", and with his suggestion that the case be remanded to the First Circuit for further consideration of the evidence's legal sufficiency. *Id.* at pp. 24-25.

Respondent similarly argues that the confidentiality agreement offered to him by Hazen Paper was "discriminatory" because it imposed a longer non-competition obligation than that required of his replacement. Once again, however, this fact is in no way probative of the charge that Biggins was offered such an agreement (and discharged when he refused to sign it) because of his age. The evidence showed that the Hazens did require Biggins' replacement (Timothy McDonald) to sign a confidentiality agreement. While the non-competition period provided for in Mr. McDonald's agreement was somewhat shorter than that proposed for Biggins, Biggins had in fact already been engaged in questionable business dealings with Hazen Paper competitors. Biggins' situation was thus not comparable to Mr. McDonald's in this particular respect; so no reasonable inference can be drawn that considerations of age account for the differences in their respective contracts. *See Burdine, supra* at p. 258; *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir. 1988) ("[plaintiff's] claim of disparate treatment must rest on proof that he and his [co-worker] were similarly situated in all relevant respects"); *EEOC v. Sperry Corp.*, 852 F.2d 503, 510-11 (9th Cir. 1988) (same).

In addition to the foregoing, there was no evidence that Biggins could not have had a shorter non-competition period in his employment agreement had he asked for it. Thomas Hazen testified without contradiction that the arrangements offered to Biggins were "negotiable", and Biggins introduced no evidence that he ever informed the Hazens that the non-competition clause contained in the proposed contract was objectionable to him. (JA 161.)⁹ Rather than attempt to negotiate this point, Biggins took the position that the proposed agreement was

⁹ Indeed, Robert Hutchinson testified that two-year non-competition agreements of the sort offered to Biggins are "common" in the paper industry. (JA 120.) More generally, this Court may take judicial notice that the confidentiality agreement tendered to Biggins was altogether characteristic of the kinds of agreements employers routinely use to protect their trade secrets. *See* M. Epstein, *Modern Intellectual Property* (2d ed. 1991), at pp. 52-53, 317-46.

acceptable on its face, but that he would sign it only if the Company met his \$100,000 salary/stock demand. (JA 84, 86-87.) The Hazens flatly refused (and nothing in the record suggests they paid such a sum to Biggins' replacement), and the parties never got beyond the impasse. That Respondent's successor — by not insisting on an overly generous compensation package — may have *ultimately* negotiated a less restrictive non-competition covenant cannot possibly support an inference of age discrimination.

3. Two Isolated And Inconsequential Remarks Are Irrelevant To Biggins' Age Discrimination Claim

Finally, Respondent attempts to rest an inference that considerations of age more likely than not motivated his discharge upon two stray remarks purportedly made by Thomas and Robert Hazen referring to Biggins' age. At trial, Biggins testified that Thomas Hazen once stated — at some indefinite time after the Company had provided members of its Executive Committee with life insurance policies — "that it was costing him a lot more for [Biggins'] policy because [he] was so old." In addition, Biggins testified that, sometime back in 1985, Robert Hazen joked that Biggins' Company-sponsored membership in a handball court "would not do [him and a fellow executive] much good because they were so old." *See* Cert. Pet. A-12-A-13, A-56.

These two fragmentary comments — innocuous in content, isolated in a bias-free history of almost ten years' employment (begun when Biggins was already 52 years old), and unrelated to and temporally remote from the relevant decisions at issue — are insufficient to sustain a finding that the Hazens' true reason for terminating Biggins' employment was his age. Numerous courts have recognized that such stray remarks are simply not probative of whether a subsequent employment action was impermissibly based on discriminatory considerations. *See, e.g., Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9-10 (1st Cir. 1990) (supervisor's remark "that 'the sales personnel

was [sic] getting too old' and that this was a 'problem' for the company" did not give rise to inference of discriminatory discharge); *Haskell v. Kaman Corp.*, 743 F.2d 113, 120 (2d Cir. 1984) (company president's description of two older employees as "old ladies" and approving references to younger employees as "young turks" were not probative of age discrimination); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980) (statements by supervisor that employer's "future lay in its young" personnel held to be merely "truisms" not probative of discriminatory purpose); *Guthrie v. Tifco Industries*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992) (former president's repeated comment that younger successor "would need to surround himself with people his age" held to be "no more than 'stray remarks,' which are insufficient to establish discrimination"); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (supervisor's "isolated" statement that he "needed younger blood" held to be "too abstract, ... irrelevant and prejudicial to support a finding of age discrimination"); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989) ("[Stray] remarks, ... when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue").¹⁰

¹⁰ Lower courts have likewise held that isolated remarks far more age-biased in character than the two quips ascribed to the Hazens will not suffice to permit a reasonable inference that a particular employment decision was more likely than not motivated by discrimination. See, e.g., *Gartland v. Hermetic Seal Corp.*, 53 FEP Cases 1414, 1415 (D. Mass. 1990) (supervisor's statement that "we should get bright young people in" and that he wanted to "get rid of deadwood" did not permit inference that plaintiff's discharge was motivated by age bias); *Shostak v. United States Postal Service*, 662 F. Supp. 158, 161 (D. Me. 1987) (supervisor's remark that plaintiff was "too old for the job" not sufficiently probative of age discrimination to establish pretext); *Carpenter v. American Excelsior Co.*, 650 F. Supp. 933, 938 (E.D. Mich. 1987) (office manager's statements that he liked his salespeople "young, mean and lean" and that plaintiff "was not as young as he used to be" held insufficient evidence to give rise to an inference of age-based discrimination); *Cash v. American Honda Motor Co.*, 45 FEP Cases 1520, 1521 (N.D. Ga. 1987) (sales

Rationally viewed, the evidence here is insufficient as a matter of law to sustain the jury's age discrimination verdict. It was, undoubtedly, this very absence of evidence relating to age which led the First Circuit into the error of relying on pension interference to support Biggins' ADEA claim. Taken singly or as a whole, the relevant evidence permits no reasonable inference that Petitioners' articulated reasons for discharging Biggins from their employ are more likely than not pretexts designed to mask unlawful age bias.¹¹

II. THE THURSTON TEST FOR LIQUIDATED DAMAGES SHOULD BE MODIFIED FOR USE IN INDIVIDUAL DISPARATE TREATMENT CASES

Petitioners submit that the *Thurston* test for liquidated damages should be modified to allow for use in individual discriminatory treatment cases.¹² As the majority of courts that

manager's isolated references to plaintiff as "old fart" and "grandpa" did not permit inference that discharge was product of age discrimination); *Long v. Chesapeake and Ohio Ry. Co.*, 42 FEP Cases 990, 998 (E.D. Va. 1986) (employees' allegations that union officers referred to them as "old women", "dead wood", "deteriorating" and "stagnant" held insufficient to establish that union acted with age-based motivation); *Berkowitz v. Allied Stores of Penn.-Ohio*, 541 F. Supp. 1209, 1218-19 (E.D. Pa. 1982) (executive's lone remark that 57 year-old plaintiff had "been around since the dinosaurs roamed the earth" held insufficient to permit inference that stated reasons for discharge were pretextual).

¹¹ To the extent that Respondent introduced evidence of *any* motivation other than the Hazens' concern over his outside activities with competitors, such motivation consisted exclusively of Thomas Hazen's irritation with Biggins' repeated demands for increased compensation, as well as a purported desire to avoid fulfilling a promise for Company stock. Far from supporting Respondent's ADEA claim, however, such evidence "would not show age discrimination. It would merely provide another reason, totally unrelated to age, for his discharge." *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987).

¹² Contrary to the suggestions of Respondent and the AARP, Petitioners are not urging that this Court adopt two different definitions of the term "willful", one for discriminatory treatment cases and one for disparate impact cases. Rather, Petitioners maintain that this Court should simply refine the definition of willful approved in *Thurston*, so that it can preserve the punitive nature of liquidated damages in *both* types of cases.

have addressed the issue recognize, modification of the “knew or showed reckless disregard” standard is necessary to avoid the virtually automatic imposition of double damages in every disparate treatment case in which predicate liability is found. *See* Brief of Petitioners, at pp. 38-43. In their briefs to this Court, Respondent and the amici supporting him argue on various grounds that the *Thurston* test is capable of preserving distinct tiers of predicate and punitive liability — even in individual disparate treatment cases — and that the test should therefore remain unchanged. These arguments are addressed seriatim.

A. The Standard Of Willfulness Urged By Petitioners Preserves The Distinction Between Predicate And Punitive ADEA Liability

All parties (save the AARP) agree that liquidated damages for “willful” violations of the ADEA were meant to be punitive, that is, reserved for exceptional cases in which an employer’s acts of age discrimination are especially culpable. As the Solicitor General states, “[t]here is no question that Congress intended ADEA double damages to be ‘punitive’, in the sense that they would be awarded in cases where an employer met (or rather failed) a higher standard of culpability than that required for simple liability.” *See* Brief of the Solicitor General, at p. 17.¹³

¹³ The NLEA’s observation that liquidated damages (which, when assessed, replace otherwise recoverable prejudgment interest) have a compensatory element does not alter the fact that Congress selected the *criminal* penalties provision of the Fair Labor Standards Act (FLSA) to govern the awarding of such damages. Thus, as this and numerous other courts have consistently recognized, liquidated damages under the ADEA were intended to be punitive, and are properly subject to a punitive standard. *See* Brief of Petitioners, at p. 37. The AARP’s contrary argument that liquidated damages are purely compensatory, *see* Brief of the AARP at pp. 10-13, is without merit. Relying upon Congress’s express adoption of a criminal standard as the benchmark for awarding double damages under the ADEA — distinguishing such damages from the compensatory double damages awarded automatically under the FLSA — this Court declared in *Thurston* that the ADEA’s provision for liquidated damages in cases of “willful” violations was “punitive in nature”. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985).

Having acknowledged the need for a willfulness standard that distinguishes ordinary from punitive liability, Biggins and his supporting amici insist that *Thurston*’s “knew or showed reckless disregard” test is sufficient to the task. It is first suggested that “disparate impact” cases comprise a class of ADEA actions in which specific intent to discriminate is not a requirement of an underlying violation, and that such cases thus involve claims in which ordinary liability will not carry with it an automatic finding of willfulness under *Thurston*. That Congress could not have intended the line between willful and non-willful violations to be drawn at disparate impact cases, however, is plain for two reasons. First, Congress enacted the ADEA in 1967, fully four years before this Court conceived the theory of adverse impact liability under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It is thus doubtful that Congress had disparate impact cases in mind when it reserved liquidated damages for violations of the statute that are “willful”.¹⁴ Furthermore, a recent survey of civil rights cases revealed that suits alleging disparate impact make up less than 2% of all employment discrimination litigation. *See Donahue and Siegelman, The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 998 n.57 (1991). Once again, Congress could not have intended a test for willfulness liability that allows liquidated damages to be assessed in 98% of all ADEA cases, particularly given this Court’s explicit rejection of willfulness standards that result in “an award of double damages in almost every case.” *Thurston*, 469 U.S. at 128.¹⁵

¹⁴ *See also* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982) (arguing that Congress did not contemplate disparate impact liability when enacting the ADEA); *cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.”).

¹⁵ Had Congress intended for liquidated damages to be awarded in all or virtually all cases in which a predicate ADEA violation is found, it would not have included an express provision in the statute for double damages reserved for “willful” violations. Instead, it would have done what it did in enacting

Respondent and his amici likewise argue that the availability of a small number of affirmative defenses under the ADEA (*viz.*, exemptions for actions taken pursuant to a bona fide employee benefit plan or seniority system, or where age is a bona fide occupational qualification) permit situations in which an employer violates the statute in the mistaken belief that its actions are legally permissible. It is suggested that these limited defenses preserve the notion of two-tiered liability in disparate treatment cases, even under the "knew or showed reckless disregard" standard of *Thurston*. This argument, however, is off the point, because it only addresses cases which (like *Thurston*) involve company-wide policies or plans — *i.e.*, employee benefit plans, seniority systems, and age requirements for jobs. In these types of cases, an employer can violate the ADEA without specifically *intending* to do so; and this potential, in turn, allows for a distinction to be drawn between willful and non-willful violations of the statute as defined by *Thurston*.¹⁶ In an individual disparate treatment action, by contrast, such potential is foreclosed by the very finding which the jury is required to make in order to attach predicate liability — namely, that an employer's articulated reason for an adverse employment action is a pretext masking an unlawful intent to discriminate. For this reason, Respondent and the amici do not — and cannot — explain how a finding of discrimination in an individual disparate treatment case will allow for an employer to

the FLSA — *viz.*, authorize an award of double damages for each and every violation of the statute. See 29 U.S.C. § 216(b). Applied without modification, the *Thurston* standard comes close to rendering the word "willful" superfluous, a result at variance with well settled principles of statutory construction. See N. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . .").

¹⁶ The same is true of the various other federal statutes providing for willfulness liability cited to the Court by Respondent and the Solicitor General. See Brief of Respondent, at pp. 20-21 n.11; Brief of the Solicitor General, at p. 10 n.3. In contrast to the ADEA, none of these statutes require *specific intent* to establish underlying violations of the law.

evade automatic willfulness liability. No explanation is possible because, as most circuits have recognized, an undifferentiated application of *Thurston* to this (most prevalent) type of discrimination claim virtually necessitates a finding of willfulness.¹⁷

In a further attempt to disjoin individual age discrimination claims from *Thurston*'s definition of a "willful" ADEA violation, the Solicitor General and NELA point to decisions of the Seventh Circuit suggesting that an employer may commit an act of disparate treatment, yet do so with something less than a specific intent to discriminate. See Brief of the Solicitor General, at pp. 14-15; Brief of the NELA, at pp. 15-16. The Seventh Circuit has reasoned that an employer can discriminate through reliance on "unconscious stereotypes", thus allowing for a distinction between knowing and unknowing violations of the statute. See, *e.g.*, *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1423 (7th Cir. 1992); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156-57 (7th Cir. 1981). Prescinding from the questionable premise that an employer can somehow discriminate on the basis of age without knowing or intending to do so, it would be folly for this Court to adopt so elusive a distinction between willful and non-willful violations of the ADEA. A legal standard for willfulness that required lay juries

¹⁷ The Solicitor General, like the First Circuit, appears to concede as much: "It is of course true that in many cases such as the present one, where no defenses or exceptions are involved, employers found liable for individual acts of age discrimination will find it difficult to show that their actions were not willful under the *Thurston* standard. . . . It is to be expected that in any case that does not involve possible affirmative defenses or questions of coverage, a decision by an employer . . . to fire . . . an individual because of his age would generally be viewed as 'willful' under any plausible definition of the term." See Brief of the Solicitor General, at pp. 15-16. See also Brief of the NELA, at p. 20 ("More times than not, disparate treatment cases involve conduct which meets the 'knew' or 'reckless disregard' standard."). Stated simply, because a finding of predicate liability represents an adjudicated conclusion that the employer acted "because of" the plaintiff's age, such ordinary liability will — with an unmodified application of *Thurston* — produce an automatic imposition of punitive damages.

to distinguish conscious from unconscious states of mind when evaluating employment decisions would ensure both a hopelessly confused fact-finder and a highly speculative verdict. As Justice O'Connor observed in a kindred context, such an endeavor would "challenge[] the imagination of the trier to probe into a purely fanciful and unknowable state of affairs." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (quotation omitted).

B. A Modified Thurston Standard Is Fully Consistent With The Language And Intent Of ADEA Section 7(b)

Petitioners have urged an interpretation of "willful" that authorizes liquidated damages only in cases where the employer's actions meet a higher standard of outrageous or egregious conduct. This requirement fulfills Congress's intent to create two tiers of ADEA liability, with liquidated damages reserved for cases where the employer's culpability is sufficiently aggravated to warrant a punitive sanction.

The Solicitor General argues that the various courts that have so modified *Thurston* have diverged from the statutory language of ADEA § 7(b). The government maintains that to supplement *Thurston* "with an additional requirement of 'outrageous' conduct is to substitute a court's notion of the proper standard for enhanced liability for that specified by Congress." See Brief of the Solicitor General, at p. 18.¹⁸ This is simply not

¹⁸ Respondent similarly argues that the term "willful" has a "plain" and "unambiguous" meaning. See Brief of Respondent, at pp. 12-14. This is an obvious overstatement. It can hardly be gainsaid that there are "various meanings that the term 'willful' has come to bear in different legal settings." See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 137 (1988) (Marshall, J., dissenting) (noting that "the dictionary includes a wide variety of definitions of 'willful', ranging from 'malicious' to 'not accidental'"). Moreover, Biggins' argument that "willful" is a term of plain meaning is undermined by Respondent's own lengthy recitation of the splintered interpretations of the term that have been taken by the circuit courts. See Brief of Respondent, at pp. 22-30.

true. The Solicitor General's argument treats *Thurston*'s definition of willfulness as though it were codified in the statute itself. As numerous courts and commentators have recognized, however, the "knew or showed reckless disregard" test approved in *Thurston* was merely an *interpretation* of the statutory standard of "willful". A different interpretation of this term to allow for use in cases different in kind from *Thurston* is no less faithful to the statute's language than was *Thurston* itself. See Charland, *Willfulness, Good Faith, and the Quagmire of Liquidated Damages Under the Age Discrimination in Employment Act*, 13 J. Corp. Law 573, 596 (1988) ("The Court [in *Thurston*] confined its holding to a relatively narrow point. It rejected some expounded definitions ... but did not render a blanket rejection of all possible definitions of willful.").¹⁹

In establishing its one-word standard for liquidated damages, Congress employed a term of elastic definition — one whose meaning could be developed as necessary to fulfill the statute's basic intent. Neither Respondent nor his supporting amici curiae offer any principled reason for an inflexible adherence to the language of *Thurston*. Indeed, given its consequence of imposing virtually guaranteed liquidated damages in individual disparate treatment cases, the *Thurston* standard cannot be reconciled with Congressional intent and should be modified.

¹⁹ Indeed, it would appear that this Court has invited the very kinds of refinement to the term "willful" here urged by Petitioners. In *Thurston*, the Court characterized the Second Circuit's "knew or showed reckless disregard" standard as "an acceptable way to articulate a definition of 'willful'." 469 U.S. at 129 (emphasis added). Likewise, in *Richland Shoe*, the Court held that "knew or showed reckless disregard" was "a fair reading" of the statutory language. 486 U.S. at 133 (emphasis added). To say merely that a particular standard is "an acceptable" or "fair" reading of "willful" by no means announces a *compulsory* construction of the term. Rather, *Thurston* and *Richland Shoe* simply held that "knew or showed reckless disregard" was one permissible definition of willful, and that, on the facts presented, such a standard was not satisfied by the evidence. Nothing in either case suggests that the Court would not refine the standard further when presented with an appropriate case for so doing.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be reversed.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL.,
PETITIONERS,
v.

WALTER F. BIGGINS,
RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals
For The First Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

ARGUMENT

Petitioners Hazen Paper Company, Thomas Hazen and Robert N. Hazen respectfully call the Court's attention to guidelines recently published by the Equal Employment Opportunity Commission (the "EEOC") entitled "Enforcement Guidance: Compensatory and Punitive Damages Available Under §102 of the Civil Rights Act of 1991" (hereinafter "EEOC Enforcement Guidance").¹

The EEOC Enforcement Guidance sets forth the position of the amicus curiae EEOC on the legal standards for awarding punitive

¹ For the convenience of the Court, the pertinent provisions of the EEOC's publication (pps. 15-18) are included in the Appendix to this Supplemental Brief.

damages pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §1981A. In Section II(B)(1) of the Enforcement Guidance, the EEOC identifies various factors which, in its view, would warrant the imposition of punitive damages to redress violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq.² These factors include:

- (1) "[t]he degree of egregiousness and nature of the [employer's] conduct";³
- (2) "[t]he nature, extent, and severity of the harm to the complaining party";
- (3) "[t]he duration of the discriminatory conduct";⁴
- (4) "[t]he existence and frequency of similar past discriminatory conduct by the [employer]";⁵
- (5) whether the employer "planned and/or attempted to conceal or cover up the discriminatory practices";

² Echoing the position advanced by Petitioners before this Court, the EEOC correctly observes that "[a] finding of liability does not itself entitle a plaintiff to an award of punitive damages" (quotation omitted), and likewise notes that "[p]unitive damages are awarded to punish the respondent and to deter further discriminatory conduct." Id. §II(B)(1), at p. 15.

³ On this point, the guidelines further state that "[c]onduct which is shocking or offends the conscience is egregious and warrants punitive damages." Id. at p. 16.

⁴ The guidelines amplify this consideration by pointing out that "an extended period of discriminatory conduct suggests an official policy of discrimination" on the part of the company, and thus greater blameworthiness. Id. at p. 17 (quotation omitted).

⁵ As an example, the guidelines state that "if there is a continuing pattern of harassment by the [employer], it may be sufficient to find malice or reckless indifference." Id. at p. 17.

- (6) whether the employer "ha[d] notice of discriminatory conduct and fail[ed] to take action"; and
- (7) whether the employer engaged in "threats or deliberate retaliatory action" against a complaining party.

See EEOC Enforcement Guidance §II(B)(1), at pp. 15-18.

Petitioners respectfully submit that the EEOC's enforcement guidelines shed light on the appropriate standard to be applied when awarding liquidated damages under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA"). Given the textual similarities between Title VII and the ADEA, see Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979), and given this Court's conclusion that ADEA liquidated damages were meant to be "punitive in nature," see Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985), the same criteria identified by the EEOC should govern an award of liquidated damages under the ADEA.

In their principal brief to this Court, Petitioners set forth a test for awarding liquidated damages under the ADEA which anticipates the very standards articulated by the EEOC for imposing analogous punitive damages for violations of Title VII. This test, which focuses on the egregiousness of the employer's conduct, the severity of the harm visited upon the plaintiff, and the existence vel non of a pattern of repeated harassment or discriminatory conduct by the employer, effectuates what Congress intended to be the punitive function of liquidated damages. Such a test should accordingly be adopted by this Court for use under the ADEA.

Respectfully submitted,

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Dated: December 17, 1992

APPENDIXEQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ENFORCEMENT GUIDANCE: COMPENSATORY AND
PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE
CIVIL RIGHTS ACT OF 1991

...

B. Punitive Damages

Punitive damages are awarded to punish the respondent and to deter future discriminatory conduct. They are not available against a federal, state, or local government, a government agency, or a political subdivision. Punitive damages are available only where the respondent acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual." Section 1981A(b)(1).

This standard is consistent with § 1981 and therefore should be interpreted consistently.¹ The standard for awarding punitive damages under § 1981 is whether the defendant acted with malice, an evil motive, or recklessness or callous indifference to a federally protected right. Stephens v. South Atlantic Cannery, Inc., 848 F.2d 484, 489, 46 EPD ¶ 38,032 (4th Cir. 1988), cert. denied, 488 U.S. 996 (1988). Additionally, under § 1983, plaintiffs may recover punitive damages when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983); Garza v. City of Omaha, 814 F.2d 553, 556, 43 EPD ¶ 37,072 (8th Cir. 1987) (punitive damages under § 1983 "may be awarded where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard for the civil rights of the plaintiff").

¹ "Punitive damages are available under [§ 1981A] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." Representative Edwards' Interpretative Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991).

1. Determining Malice or Reckless Disregard

A "finding of liability does not of itself entitle a plaintiff to an award of punitive damages." Yarbrough v. Tower Oldsmobile, 789 F.2d 508, 514, 40 EPD ¶ 36,216 (7th Cir. 1986). However, conscious, purposeful discrimination may be sufficient to warrant punitive damages.² As the First Circuit has observed, "can it really be disputed that intentionally discriminating against a [B]lack man on the basis of his skin color is worthy of some outrage?" Rowlett v. Anheuser-Busch, 832 F.2d 194, 206, 44 EPD ¶ 37,428 (1st Cir. 1987). In Brown v. Freedman Baking Company, 810 F.2d 6, 42 EPD ¶ 36,779 (1st Cir. 1987), punitive damages were warranted for three Black plaintiffs, after two plaintiffs were fired because a manager believed that it "just doesn't look good" for too many Blacks to work in the main store. The third plaintiff complained and was told that when too many Blacks get together "they get arrogant." He was fired when he provided a statement to the EEOC on the other plaintiffs' behalf. The court stated that it "would not be unreasonable for the jury to view such conduct as outrageous and deserving of substantial punitive damages." Id. at 11.

A number of factors may be considered to determine whether conduct was committed with malice or reckless indifference to the complaining party's federally protected rights. This evidence is likely to have already been obtained during the liability phase of the investigation. The list is nonexclusive and other relevant factors may also be considered.

1. The degree of egregiousness and nature of the respondent's conduct should be considered. See Restatement (Second) of Torts,

² Malice is defined as "a condition of mind which prompts a person to do a wrongful act wilfully, that is, on purpose, to the injury of another." Black's Law Dictionary 862 (5th ed. 1979). Thus, discriminatory conduct "is maliciously done if prompted or accompanied by ill will... either toward the injured person individually or toward all persons in one or more groups ... of which the injured person is a member." Soderbeck v. Burnett County, 752 F.2d 285, 289 (7th Cir. 1985), cert. denied, 471 U.S. 1117 (1985).

§ 908(2). In EEOC v. Gaddis, 733 F.2d 1373, 1380, 34 EPD ¶ 34,348 (10th Cir. 1984), the court held that allowance of punitive damages "involves an evaluation of the nature of the conduct in question." The respondent had made an employment offer to the plaintiff, an out-of-state resident, based upon a recommendation by another employee. Plaintiff accepted the position and his name was posted on an assignment board as a new employee. The respondent met the plaintiff for the first time when he reported for work. The respondent was visibly upset when he discovered that the plaintiff was Black and stated that a Black person would never be allowed to work in the office. The plaintiff worked for several days and was fired. The respondent stated that no vacancy existed, although it subsequently hired two White males for the position. The court determined that this conduct warranted punitive damages.

Conduct which is shocking or offends the conscience is egregious and warrants punitive damages. For example, CP's supervisor often asks CP for dates and sometimes makes sexual remarks to her, although CP has repeatedly asked him to leave her alone. The supervisor finally tells CP, who is the most qualified person for an upcoming promotion, that if she wants the promotion she must have sex with him. The supervisor's conduct may be considered "shocking."

2. The nature, extent, and severity of the harm to the complaining party should be considered. The Restatement (Second) of Torts, § 908(2); Keenan v. City of Philadelphia, 55 FEP Cases 932, 943 (E.D. Pa. 1991).

3. The duration of the discriminatory conduct is relevant. For instance, an extended period of discriminatory conduct "suggests an official policy of discrimination as opposed to the work of a renegade supervisor." Williamson v. Handy Button Machine Company, 817 F.2d at 1296. Evidence that the respondent tolerated or condoned the discriminatory conduct over a period of time could constitute malice and/or reckless indifference.

4. The existence and frequency of similar past discriminatory conduct by the respondent should be considered. For example, if

there is a continuing pattern of harassment by the respondent, it may be sufficient to find malice or reckless indifference.

5. Evidence that the respondent planned and/or attempted to conceal or cover-up the discriminatory practices or conduct is relevant.

6. The employer's actions after it was informed of discrimination should be considered. An employer who has notice of discriminatory conduct and fails to take action could incur punitive damages. See Yarbrough v. Tower Oldsmobile, 789 F.2d at 514-15 (punitive damages warranted under § 1981 where the plaintiff testified that his supervisor reprimanded him in writing, without cause, and transferred him to a less desirable work area after saying "[w]e don't want no Black guy in the front of the shop;" the plaintiff brought his complaints of discrimination to management, who failed to respond and was found to be "indifferent to his federally protected rights").

7. Proof of threats or deliberate retaliatory action against complaining parties for complaints to management or filing a charge normally will constitute malice. Hunter v. Allis-Chalmers, 797 F.2d 1417, 1425, 41 EPD ¶ 36,417 (7th Cir. 1986) (punitive damages warranted where the defendant had deliberately fired a worker for making well-founded complaints with a state FEP agency about persistent acts of racial harassment); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1260, 37 EPD ¶ 35,317 (6th Cir. 1985) (manager's threat to hurt plaintiff economically for pursuing his complaints of harassment may constitute malice), cert. denied, 475 U.S. 1015 (1986).

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL., PETITIONERS

v.

WALTER F. BIGGINS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the definition of "willfulness" approved by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), for the imposition of liquidated damages under the Age Discrimination in Employment Act may properly be applied in cases of individual discriminatory treatment.

2. Whether evidence that an employer interfered with the vesting of an employee's pension rights, under a plan where benefits vest after ten years of service and are not based directly on age, may be used to support a verdict of age discrimination.

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OCTOBER TERM, 1992

No. 91-1600

HAZEN PAPER COMPANY, ET AL., PETITIONERS

v.

WALTER F. BIGGINS

*ON WRIT OF CERTIORARI TO THE UNITED STATES
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**BRIEF FOR THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE**

**INTEREST OF THE UNITED STATES AND THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

This case concerns the standard for awarding liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and the question whether evidence of interference with pension rights may support a jury finding of age discrimination under the ADEA. The Equal Employment Opportunity Commission has primary responsibility for the administration, interpretation and enforcement of the ADEA. The Department of Justice has a significant interest in the in-

terpretation and enforcement of a wide range of federal civil rights statutes, including the ADEA. The resolution of the issues presented in this case will directly affect the government's discharge of its responsibilities.

STATEMENT

Petitioner Hazen Paper Company is a manufacturer of paper products with decorative coatings for use in products such as cosmetic wrap, lottery tickets, and pressure sensitive labels. C.A. App. 291-292. In 1977, Hazen Paper hired respondent, who was then 52 years old, to serve as its Technical Director. *Id.* at 289-290, 417. In 1983, based on his perceived contributions to Hazen Paper's success, respondent began requesting pay raises. *Id.* at 345-348. Respondent and petitioners continued to discuss compensation issues over the next three years.

In May 1986, petitioners Thomas and Robert Hazen asked respondent to sign a confidentiality agreement, expressing their concern that respondent—through two companies he set up with his son—was providing to competitors some of the services he performed for Hazen Paper. C.A. App. 358-361. Respondent countered that the Hazens had approved his limited involvement in his son's companies (*id.* at 362-363), that his son did most of the work, and that he earned no money from either venture. *Id.* at 370. Nonetheless, respondent told the Hazens he would sign a confidentiality agreement if it was accompanied by a satisfactory agreement on compensation. *Id.* at 374.

About a week later, respondent was presented with a draft agreement under which he would have agreed to assign the rights to all inventions made within the scope of his employment to Hazen Paper, maintain the confidentiality of the company's trade secrets, and not engage directly or indirectly in any competitive business. C.A. App. 1138-1142. The agreement did not address respondent's compensation, and did not provide for severance pay if respondent's employment was terminated. Although told that he would be fired unless he did so, respondent,

then 62, refused to sign the agreement. *Id.* at 371, 375, 378. He also declined petitioners' offer to enter into a consulting arrangement, under which he would not have employee status or benefits. *Id.* at 970-971. Respondent was fired on June 13, 1986. *Id.* at 377-378. At the time, he had been employed by petitioners for over nine years; his rights under the Hazen Paper pension plan would have vested on the tenth anniversary of his employment.

In September 1986, Hazen Paper hired Timothy McDonald, who was about 35 years old, to replace respondent as Technical Director. C.A. App. 779-780. McDonald was required to sign a confidentiality agreement, which contained a six-month non-competition clause and provided for 100 days of separation pay. *Id.* at 1501-1508. None of Hazen Paper's other employees was asked to sign a confidentiality agreement. *Id.* at 373-374.

Respondent sued petitioners in federal district court alleging age discrimination in violation of the ADEA and interference with the vesting of his pension in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Respondent's suit also included various state law claims relating primarily to disputes over his compensation.

At trial, in addition to evidence of the events set out above, respondent testified that the Hazens twice made comments about his age. He testified that Thomas Hazen told him that his life insurance policy cost more because he was "so old," and that Robert Hazen joked that respondent and another employee would not need a company handball court membership because they were "so old." C.A. App. 402. Thomas Hazen, who made the decision to fire respondent, testified that he was "absolutely" aware that age discrimination was illegal. *Id.* at 966-967.

The district court instructed the jury that in order to prevail on his age discrimination claim, respondent had to "prove by a preponderance of the evidence that but for his age, he would not have been fired." C.A. App. 1086. The charge on the ADEA claim did not mention respondent.

ent's pension status. The jury was instructed that if it found for the plaintiff on the age discrimination claim, it must further determine whether the violation was "willful," *id.* at 1088, and that to find willfulness it must find that petitioners "knew of or showed reckless disregard for, the law prohibiting age discrimination * * * [and,] with bad purpose, intentionally disobeyed or ignored the law." *Id.* at 1088-1089. Petitioners did not object to any of the court's instructions on the ADEA claim. *Id.* at 1115.

The jury found that petitioners willfully violated the ADEA when they fired respondent, and awarded respondent \$560,775 in back pay. C.A. App. 41. The court subsequently awarded respondent an equal amount of liquidated damages based on the finding of willfulness. *Id.* at 46-47; 29 U.S.C. 626(b). The jury also accepted respondent's ERISA claim that petitioners fired him in order to interfere with the vesting of his pension rights (see 29 U.S.C. 1140), and agreed with respondent on most of his state law claims. C.A. App. 42-45.

Petitioners moved for judgment notwithstanding the verdict on the ADEA claim, arguing that there was insufficient evidence to support a finding that respondent was fired because of his age, and that even if there was an ADEA violation it was not willful because there was no direct evidence of egregious misconduct. C.A. App. 54-63. The district court granted the motion only in part, holding that the evidence, although sufficient to support a finding of age discrimination, was "a bit thin" and too "sparse [and] circumstantial" to support a finding of willfulness. Pet. App. A56-A62.

Both parties appealed. The court of appeals affirmed the district court's ruling that the evidence was sufficient to uphold the jury's finding that respondent was fired because of his age. Pet. App. A14. The court reviewed several pieces of evidence "bearing directly on the ADEA claim": the critical comments the Hazens made about respondent's age (*id.* at A12-A13); the difference be-

tween the confidentiality agreement offered to respondent and the agreement offered to his younger successor (*id.* at A13); the fact that if respondent had worked for "a few more weeks," he would have completed ten years of service and his pension rights would have vested (*ibid.*); and the fact that under the consulting offer made to respondent as an alternative to his signing the confidentiality agreement without a pay increase, respondent would have lost his employee benefits (*id.* at A13-A14). The court concluded that based upon this evidence, "the jury could reasonably have found that Thomas Hazen decided to fire [respondent] before his pension rights vested and used the confidentiality agreement as a means to that end," and that the "jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years." *Id.* at A14. The court held that the jury could reasonably have found that age was a determining factor in the decision to terminate respondent's employment. *Ibid.*

The court of appeals reversed the district court's holding that the evidence did not support the jury's finding of willfulness. Pet. App. A21. After surveying the various standards other courts of appeals have used to determine willfulness, the court decided to "adopt, without modification or qualification," the test for willfulness set out by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985): "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Pet. App. A20 (quoting *Thurston*). The court reinstated the finding that the violation was willful because (i) the jury was instructed that age had to be the determining factor in the decision to fire respondent in order to find the underlying ADEA violation, (ii) there

was evidence that Hazen Paper was aware of the illegality of age discrimination, and (iii) the ADEA finding itself rested on a "solid evidentiary foundation." *Id.* at A21.

SUMMARY OF ARGUMENT

I. The ADEA provides for recovery of lost wages in cases of age discrimination, and for double damages in cases of "willful" violation of the statute. The court of appeals applied a definition of "willfulness" that this Court has twice approved for use under the ADEA. That standard, announced in *Trans World Airlines, Inc. v. Thurston*, *supra*, requires that an employer have violated the law either knowingly or recklessly, and comports with both conventional legal usage and Congressional intent.

Although this Court has made clear that Congress intended the "willfulness" standard to define a meaningful "two-tier" scheme of liability under the ADEA, there is no reason to expect that "ordinary" and "willful" cases will occur in equal proportions in different types of ADEA cases, including individual discrimination cases. Individual cases are by their nature more likely to be ones in which an employer has intentionally discriminated against a particular employee, knowing (or not caring) that such discrimination is illegal. Even in individual cases, however, there are various ways in which an employer's actions could be intentional without being "willful" under the *Thurston* standard. That standard therefore maintains Congress's "two-tier" liability structure both overall and in such cases, without the need for any modification.

Some courts of appeals, erroneously reading *Thurston* to require that "willfulness" be found in a smaller proportion of individual discrimination cases than application of the *Thurston* standard itself would produce, have required individual plaintiffs to produce greater or more persuasive evidence of an underlying ADEA violation in order to sustain a second-order finding that the defendant's conduct was "willful." Besides being unnecessary

under a proper interpretation of *Thurston*, these enhanced burdens depart illogically and without justification from the statutory standard selected by Congress for imposition of double damages.

II. Petitioners present the question whether evidence that they interfered with the vesting of respondent's pension could be used to support the verdict that they discriminated against respondent because of his age. We doubt whether this case presents the issue in the context most appropriate for consideration by this Court. Assuming that the Court reaches the question, however, we agree that in considering the sufficiency of the evidence supporting the verdict on respondent's ADEA claim, the court of appeals should not have relied on pension evidence that, in the particular context of this case, had very little relevance to the question of age discrimination.

Although we doubt that the court of appeals viewed the pension evidence as determinative, and the jury's verdict can be sustained without reference to that evidence, this Court may nonetheless wish to remand to the court of appeals to permit it to assess the sufficiency of the remaining evidence in the first instance. In any event, because discrimination cases present a particularly wide variety of facts and circumstances, we think it would be unwise to mandate any per se rule governing the consideration of evidence like that presented in this case. The weight to be accorded such evidence in other cases should ultimately be left to the sound discretion of courts confronted with specific cases in which the relevant issues actually arise.

ARGUMENT

I. DISCRIMINATION AGAINST AN INDIVIDUAL IN VIOLATION OF THE ADEA IS "WILLFUL" IF THE EMPLOYER ACTED KNOWINGLY OR WITH RECKLESS DISREGARD FOR THE LAW

A. Application of the *Thurston* Definition of "Willfulness" in Individual Discrimination Cases Comports With the Plain Language of the ADEA

Section 7(b) of the ADEA, 29 U.S.C. 626(b), generally incorporates the enforcement scheme of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* In particular, Section 7(b) states that amounts owing to an individual because of a violation of the ADEA shall generally be treated as unpaid minimum wages for purposes of Section 16 of the FLSA, 29 U.S.C. 216. Section 16 provides that an employer that violates the FLSA shall be liable to injured employees "in the amount of their unpaid minimum wages, * * * and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). As to the ADEA, however, Congress provided that the double ("liquidated") damages imposed under the FLSA would be available only in cases of "willful" violations of the law. ADEA § 7(b), 29 U.S.C. 626(b).¹

This Court considered the ADEA's use of the term "willful" in *Trans World Airlines, Inc. v. Thurston*, *supra*. The *Thurston* Court accepted the court of appeals' formulation of the willfulness standard—"a violation is 'willful' if 'the employer either knew or showed reckless

¹ Under Section 11 of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 89, as amended, 29 U.S.C. 260, a court may in its discretion reduce or deny liquidated damages otherwise payable under the FLSA where an employer shows that the act or omission giving rise to liability was taken in "good faith" and with "reasonable grounds" for believing that it did not violate the law. Congress did not incorporate this provision into the ADEA, but this Court has noted that the ADEA's "willfulness" proviso reflects "the same concerns." *Thurston*, 469 U.S. at 128 n.22.

disregard for the matter of whether its conduct was prohibited by the ADEA'"—although it disagreed with the lower court's application of that standard to the facts of the case. 469 U.S. at 126, 128-130 (quoting *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). The Court rejected any requirement that an employer have acted with "evil motive or bad purpose" or specific intent to violate the law, *id.* at 126 n.19, as well as the opposite contention that any violation should be "willful" if the employer "simply knew of the potential applicability of the ADEA," *id.* at 127.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Court reaffirmed the *Thurston* definition of "willfulness" and applied it in the closely related context of the three-year statute of limitations that applies to "willful" violations of both the ADEA and the FLSA. 29 U.S.C. 255(a), 626(e)(1). Noting that *Thurston's* definition comported with both everyday language and common legal usage, the Court concluded that "[t]he standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act." 486 U.S. at 133.

As this Court recognized in both *Thurston* and *Richland Shoe*, the primary import of the term "willful" in conventional legal usage has been to set a high standard for imposition of legal sanctions, excluding actions that are reasonable or even negligent but taken in good faith. *Thurston*, 469 U.S. at 128-129 & n.22; *Richland Shoe*, 486 U.S. at 133, 135 & n.13. As the *Thurston* Court pointed out, for example, 469 U.S. at 125-126, the ADEA's "willfulness" limitation on double damages grew out of the same limitation on criminal liability under the FLSA, which had been interpreted to preclude liability unless the employer proceeded "without making any reasonable effort to determine whether the plan he [was] following would constitute a violation of the law." *Id.* at 126

(quoting *Nabob Oil Co. v. United States*, 190 F.2d 478, 479-480 (10th Cir.), cert. denied, 342 U.S. 876 (1951)).² The courts have applied similar definitions in a wide variety of contexts.³

In this case, a jury found that Walter Biggins had proved by a preponderance of the evidence that his employer had intentionally discriminated against him on the basis of his age: that "but for his age, he would not

² Congress may normally be presumed to have been aware of prior interpretations of a law that it incorporates into a new statute. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (ADEA incorporates prior interpretation of FLSA right to jury trial); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 211 (1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 & n.66 (1982).

³ See, e.g., *Thurston*, 469 U.S. at 126-127; *United States v. Illinois Central R.R.*, 303 U.S. 239, 243 (1938) (Cruelty to Animals Act; violation "willful" if defendant "either intentionally disregards the statute or is plainly indifferent to its requirements") (quoting *St. Louis & S.F. Ry. v. United States*, 169 Fed. 69 (8th Cir. 1909)); *United States v. Murdock*, 290 U.S. 389, 394-396 (1933) (Revenue Acts of 1926 and 1928; act "willful" if "marked by careless disregard whether or not one has the right so to act," entitling defendant to instruction "with respect to his good faith and actual belief"); *Honey v. United States*, 963 F.2d 1083, 1087 (8th Cir. 1992) (Internal Revenue Code; violation "willful" if defendant "acts or fails to act * * * with knowledge or intent * * * [or] by proceeding with a 'reckless disregard of a known or obvious risk'" (quoting *Olsen v. United States*, 952 F.2d 236, 240 (8th Cir. 1991)); *Alabama Power Co. v. Federal Energy Regulatory Comm'n*, 584 F.2d 750, 753 (5th Cir. 1978) (Federal Power Act; willfulness requires "an intentional disregard of the reporting requirement or a plain indifference to it"); *Aero Mayflower Transit Co. v. ICC*, 535 F.2d 997, 999-1001 (7th Cir. 1976) (Interstate Commerce Act; "plain indifference"); *F.X. Messina Construction Corp. v. Occupational Safety & Health Review Comm'n*, 505 F.2d 701, 702 (1st Cir. 1974) (Occupational Safety and Health Act; violation "willful" where company acted with "indifference" to requirements of which it was "obviously aware"); *Darby v. United States*, 132 F.2d 928, 930 (5th Cir. 1943) (willfulness under FLSA Section 16(a) requires at least negligence as to legal requirements but not actual "evil motive").

have been fired." C.A. App. 1086 (jury instructions). The jury further found that the employer's actions were "willful," after being instructed that it should do so only if it believed that the employer "knew of or showed reckless disregard for, the law prohibiting age discrimination" and "intentionally disobeyed or ignored the law." C.A. App. 1088-1089. That definition of "willfulness" accords with *Thurston*, with the conventional legal use of the term, and with common sense. We therefore believe that this Court should approve the decision of the court below in this case and those of other courts of appeals that have properly applied the standard set out in *Thurston* to cases of individual discrimination.⁴

B. No Heightened Standard Is Necessary in Individual Discrimination Cases to Preserve the "Two-Tier" Liability Structure Established by Congress Under the ADEA

Petitioners do not appear to dispute *Thurston's* analysis of the plain meaning of the statute's "willfulness" language. Instead, they argue (Pet. 8-14) in essence that when applied in an individual age discrimination case, the *Thurston* definition of willfulness conflicts with *Thurston's* own analysis of Congress's intent in enacting the willfulness limitation. We do not believe that there is any such conflict.

As petitioners point out (Pet. 8-9), *Thurston* rejected the contention that an employer's action could be "willful" merely because the employer "knew of the potential applicability of the ADEA." 469 U.S. at 127-128. After determining that Congress intended liquidated damages under the ADEA to be "punitive in nature," *id.* at 125, the Court pointed out that because virtually all employers

⁴ Pet. App. A20-A21; see also, e.g., *Benjamin v. United Merchants & Mfrs., Inc.*, 873 F.2d 41, 43-44 (2d Cir. 1989); *Brown v. M & M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987); *Formby v. Farmers & Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990).

would be aware of the ADEA, the "potential applicability" standard "would result in an award of double damages in almost every case." *Id.* at 128. The Court held that such a standard would vitiate the "two-tiered" ordinary/punitive liability scheme intended by Congress. *Ibid.*

Petitioners argue that "in [individual] discriminatory treatment cases, a finding of predicate discrimination liability necessarily requires a finding of discriminatory intent," and that therefore a "mechanical" application of the *Thurston* definition of "willfulness" in such cases "will inexorably lead to double damages in every case, a result contrary to the clear Congressional intent explicated by the Supreme Court in *Thurston*." Pet. 10. Their position finds some support in a number of court of appeals opinions.⁵ Both petitioners and those courts, however, fundamentally misconstrue *Thurston's* admonition to preserve the distinction between ordinary and "willful" violations. *Thurston* nowhere holds that such a difference must be significant or even evident in any particular category of ADEA cases, such as individual discrimination cases. *Thurston*—and the statute—require only that the distinction be meaningful in the context of ADEA cases taken as a whole.⁶

⁵ See *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988) ("the practical result" of applying the *Thurston* standard would be to "permit[] a willful violation whenever liability is found in a disparate treatment case"); *Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1163-1164 (6th Cir. 1991) (quoting *Cooper*); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987) (*Thurston* standard "difficult to reconcile with the admonition to avoid imposing liquidated damages in every case, at least in the context of disparate treatment cases"); *Dreyer v. ARCO Chem. Co.*, 801 F.2d 651, 657 (3d Cir. 1986), cert. denied, 480 U.S. 906 (1987) ("[t]here is a danger that use of the 'knew or reckless disregard' standard for a discrete employment decision that has been made on the basis of age would in effect allow the recovery of liquidated damages any time there was a violation of the Act").

⁶ The notion, implicit in petitioners' argument, of adopting different definitions of "willful" for different types of ADEA cases in

Application of the *Thurston* standard to all ADEA cases, including individual discrimination cases, clearly achieves this purpose. For example, the ADEA provides several affirmative defenses and exceptions. See, e.g., ADEA § 4(f), 29 U.S.C. 623(f); *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989) (actions taken pursuant to bona fide employee benefits plans); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (actions taken on the basis of reasonable factors other than age). In cases where an employer argues that such a provision is applicable, there is ample room for a court to find that an employer engaged in illegal disparate treatment, without doing so "willfully." In *Thurston* itself, this Court held that the employer could not justify a policy that discriminated on its face on the basis of age⁷ under either the "bona fide occupational qualification" provision of 29 U.S.C. 623(f)(1) or the "bona fide seniority system" provision of 29 U.S.C. 623(f)(2), and thus upheld liability under the ADEA; the Court reversed the holding of willfulness, however, because the employer did not act in reckless disregard of the law.⁸ 469 U.S. at 124-125, 129.

order to achieve a particular mix of results is difficult to reconcile with the language of the statute.

⁷ It has been suggested that *Thurston* was a "disparate impact" case, and that its standard "is less useful in * * * disparate treatment cases[s] in which an individual employee alleges intentional discrimination aimed specifically at him." *Cooper*, 836 F.2d at 1549; see also *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Lindsey*, 810 F.2d at 1099. As the Sixth Circuit later recognized, *Thurston* was not a disparate impact case. *Wheeler*, 937 F.2d at 1162 n.1 & 1164 n.3 ("[t]he policy that produced the adverse impact in *Thurston* was intentionally discriminatory * * * rather than neutral on its face"). See also *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1065 n.4 (7th Cir. 1989). The distinction between *Thurston* and cases like the present one is instead the difference between individual employment decisions and decisions based on employment plans or policies of general application.

⁸ The *Thurston* Court held that the employer "acted reasonably and in good faith in attempting to determine whether [its] plan

Even considering only individual discrimination cases, petitioners' concern (Pet. 8) that application of the *Thurston* standard will result in double damages "in literally every discriminatory treatment case" is overstated. The difference between negligent and reckless mistakes as to the legality of employment decisions leaves meaningful room for findings of unlawful but non-willful actions. See *Richland Shoe*, 486 U.S. at 135 n.13. See also, e.g., *Price v. Marshall Erdman & Associates, Inc.*, Nos. 91-2303, 91-2373 & 91-3727 (7th Cir. July 8, 1992), slip op. 4-6 (Posner, J.) (supervisor's assertion that he believed the ADEA did not protect persons under 50, if true, would support finding of recklessness of large employer, but might show mere negligence on the part of small employer or supervisor himself); *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1458 (7th Cir. 1992); *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir. 1989); *Syrook v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156-157 (7th Cir. 1981) ("[a]ge discrimination resulting from unconscious stereotyping of an older person's abilities violates the ADEA although it may not have occurred with the state of mind necessary to a finding of willfulness").⁹

would violate the ADEA." 469 U.S. at 129. *Richland Shoe* makes clear that an employer that acted "unreasonably, but not recklessly, in determining its legal obligation" would also be protected from double damages. 486 U.S. at 135 n.13.

⁹ In addition, employers may reasonably raise affirmative defenses in some individual discrimination cases. See *Passer v. American Chem. Soc'y*, 935 F.2d 322, 329 (D.C. Cir. 1991) (reversing summary judgment that an executive actually receiving more than \$44,000 in annual pension benefits but possibly not entitled to that amount came within terms of ADEA § 12(c)(1), 29 U.S.C. 631(c)(1), permitting mandatory retirement for "bona fide executives" who are "entitled to an immediate nonforfeitable annual retirement benefit * * * [of] at least \$44,000"); *Brown v. M & M/Mars*, 883 F.2d at 513 (possibility of bona fide occupational qualification defense preserves room for non-willful liability). See also *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir. 1988) (two year limitations

In application, the reckless disregard standard has not resulted in inevitable findings of willfulness in individual ADEA cases. See *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1423 (7th Cir. 1992); *Holzman v. Jaymar-Ruby, Inc.*, 916 F.2d 1298, 1304-1305 (7th Cir. 1990); *Overgard v. Cambridge Book Co.*, 858 F.2d 371, 376-378 (7th Cir. 1988). Similarly, since *Richland Shoe*, several courts applying the *Thurston* standard to determine the appropriate statute of limitations have found violations of the FLSA not to be willful. See *Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1515 (1st Cir. 1991); *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 (5th Cir. 1990) (where employer acted unreasonably but not recklessly, FLSA double damages appropriate but statute of limitations not extended); *Cook v. United States*, 855 F.2d 848, 850 (Fed. Cir. 1988).

It is of course true that in many cases such as the present one, where no defenses or exceptions are involved, employers found liable for individual acts of age discrimination will find it difficult to show that their actions were not "willful" under the *Thurston* standard. This is neither surprising nor inappropriate. This Court has characterized individual disparate treatment as "the most easily understood type of discrimination"; it occurs when an employer "simply treats some people less favorably than others because of" some protected characteristic. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Under the ADEA, that characteristic is age. It is to be expected that in any case that does not involve possible affirmative defenses or questions of coverage, a decision by an employer not to hire, to fire or not to promote an individual because

period applied to individual claims because employer's good faith belief in applicability of FLSA exemption for executive employees precluded finding of recklessness); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 622 (8th Cir. 1991) (where application of the FLSA executive exemption is at least arguable, "willfulness and good faith must be considered in the context" of the defense).

of his age would generally be viewed as "willful" under any plausible construction of the term. The fact that application of the *Thurston* test will result in a finding of willfulness in appropriate cases is not, however, an argument against the test, even if those cases are numerous or represent a high proportion of a particular category of ADEA litigation. As the court of appeals held (Pet. App. A20), in many individual discrimination cases, willfulness is simply "the nature of the beast."

C. The Heightened Standards of Evidentiary Review Suggested by Petitioners and Some Courts of Appeals for Findings of "Willfulness" Are Inconsistent With the Statute and With the Findings of Fact Required to Establish Predicate Liability for Discrimination

Some courts of appeals have adopted the position urged by petitioners, agreeing that the *Thurston* standard is inadequate because it would generally produce findings of "willfulness" in individual discrimination cases. Six circuit courts have devised essentially three different "enhancements" of the *Thurston* standard to avoid this perceived problem. Because their objective is fundamentally flawed, however, the courts that have tried to elaborate on *Thurston* have only been able to erect additional evidentiary hurdles that bear no relationship to the statutory language. Such enhanced standards will indeed reduce the number of cases in which double damages are awarded. But in so doing they will subvert, rather than enforce, the language of the statute and the will of Congress.

The Third Circuit has taken perhaps the most aggressive position in limiting awards of liquidated damages, requiring the plaintiff in an individual discrimination case to establish that an employer's conduct was in some respect "outrageous" before it can meet the statutory requirement of "willfulness." *Dreyer*, 801 F.2d at 657-

658.¹⁰ The court based its requirement on this Court's acknowledgment in *Thurston*, 469 U.S. at 125, that Congress intended double damages under the ADEA to be "punitive in nature," and a statement in the Restatement (Second) of Torts that punitive damages may properly be awarded for conduct that is "outrageous." 801 F.2d at 657 (quoting Restatement (Second) of Torts § 908(2) (1982)).

There is no question that Congress intended ADEA double damages to be "punitive" in the sense that they would be awarded in cases where an employer met (or rather failed) a higher standard of culpability than that required for simple liability.¹¹ Congress also, however, provided its own definition of that higher standard on the face of the statute: the "punitive" sanction is justified in cases where the defendant's actions were "willful."¹²

¹⁰ The Fifth Circuit appears to have imported a similar requirement of "egregious" conduct into its willfulness analysis. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989).

¹¹ In some ways, ADEA liquidated damages are significantly different from traditional punitive damages. They supplement a basic ADEA award that provides only for recovery of lost wages and benefits, which often does not fully compensate victims of discrimination for their losses. Cf. *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951) (backpay remedy under NLRA does not compensate victims for collateral losses). They are thus much less of a "wind-fall" to plaintiffs than in cases where ordinary damages are calculated to provide full compensation for actual injuries. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). ADEA liquidated damages are also, of course, statutorily limited to double the plaintiff's back wages; traditional punitive damages are not limited in this way.

¹² The *Dreyer* court thought that an enhanced standard was necessary "in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages." 801 F.2d at 658. But the award of double damages is not a finding of a separate substantive ground of liability; it is a characterization of the blameworthiness of the actions that gave rise to the original finding. In cases where the underlying

The term "willful" has its own meaning, elaborated in *Thurston* and discussed above; to supplement that meaning with an additional requirement of "outrageous" conduct is to substitute a court's notion of the proper standard for enhanced liability for that specified by Congress.¹³

Similarly, the Sixth and Tenth Circuits have limited the award of double damages in individual cases to plaintiffs who can show that age was not only a determining factor in the questioned employment decision—the ground for predicate liability—but "the predominant factor" in that decision. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d at 1551; see *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d at 158 (following *Cooper*). Both courts based their excursion beyond the statutory language on the familiar but erroneous ground that *Thurston* required "two tiers" of liability in every type of ADEA case (and the companion error that simple application of the statutory standard, as explicated in *Thurston*, would result in double damages in every individual discrimination case). 836 F.2d at 1549-1551; 851 F.2d at 157-158.

In struggling to limit the award of double damages in ways not required by the statute (or by *Thurston*), the

conduct can properly be characterized as "willful," that fact will often appear from the same evidence used to establish that conduct in the first place. But see note 16, *infra* (liability evidence will not always suffice to demonstrate willfulness).

¹³ The "outrageousness" standard has been criticized by other courts of appeals. See Pet. App. A20 (opinion below) ("This seems to us to fly in the face of *Thurston*, and we find the term 'outrageous' simply too amorphous to be of assistance in determining what constitutes a willful violation"); *Brown v. Stites Concrete, Inc.*, Nos. 91-2581, 91-3057 & 91-3139 (8th Cir. July 15, 1992), slip op. 7-9 & n.6 ("[n]othing in the ADEA or *Thurston* requires that a jury find a defendant culpable of outrageous conduct to award liquidated damages"); *Brown v. M & M/Mars*, 883 F.2d 505, 513 (7th Cir. 1989) (requirement of outrageousness "does not flow naturally from the ADEA's adoption of willfulness as the necessary predicate to liquidated damages"); *Cooper*, 836 F.2d at 1551.

courts have perforce developed a test that is arbitrary from the standpoint of the statutory text. The "predominant factor" test is not necessarily an irrational limitation; it simply bears no relation to the limitation selected by Congress. To be liable under the ADEA at all, an employer must have acted in a way that it would not have acted but for the plaintiff's age. The fact that other factors—legitimate, arbitrary, or perfidious, but unrelated to age—may have contributed to the employer's actions has no logical bearing on the secondary statutory inquiry of whether the employer acted with knowledge of or a reckless disregard for the illegality of its conduct to whatever extent it was based on age. If it did, it acted "willfully" within the meaning of the statute.

Finally, the Fourth and Eighth Circuits have tied the availability of liquidated damages under the ADEA to the strength or nature of the underlying proof of discrimination.¹⁴ *E.g.*, *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390-1391 (4th Cir. 1987) (upholding liability but finding case "too thin to support the finding of a willful violation"); *Brown v. Stites Concrete*, slip op. 7-9 & n.7 ("district courts should * * * instruct juries that a plaintiff must present direct evidence of the employer's willfulness * * * [such as] statements or actions of an employer indicating a bias or animus against older workers") (emphasis added).¹⁵ But the *strength* and *type* of

¹⁴ Petitioners include the Seventh Circuit in this category (Pet. 11-12), citing *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1223-1224 (7th Cir. 1991). But *Aungst* applied the *Thurston* standard, without more. Its reference to a finding of willfulness requiring "evidence beyond that which would prove an ordinary claim" refers "specifically" to the plaintiff's burden of proving "the intent and knowledge of the employer"—which of course is perfectly consistent with *Thurston*. The Seventh Circuit clearly applies the *Thurston* standard *tout court*. *Brown v. M & M/Mars*, 883 F.2d at 512-514.

¹⁵ See also *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (two-tier standard meaningful where "willful-

evidence used to prove a violation should not be confused with the substance of the violation proved, including the employer's state of mind.

In relatively weak cases, where the evidence is thin, or pretext cases, where the plaintiff prevails by showing that the defendant's explanation for an employment action is unworthy of belief, triers of fact may as a practical matter be less convinced that discrimination actually took place than in cases where there is direct evidence of discriminatory motivation. Such doubts are to be resolved, however, either by the trier or by a reviewing court, in the finding of ADEA liability *vel non*. The plaintiff must convince the trier of fact, by whatever method and with whatever quantum of proof (sufficient to sustain the verdict), that the employer intentionally discriminated on the basis of age. That predicate fact established, however, it must logically be taken as true, without any requirement of further proof, for purposes of the determination of willfulness.¹⁶

ness" predicated on "direct evidence—more than just an inference from, say, an arguably pretextual justification—of age-based animus"); *Hansard v. Pepsi-Cola*, 865 F.2d at 1470 (denying liquidated damages because the "evidence in this case was weak"). Compare *Smith v. Great American Restaurants, Inc.*, Nos. 91-1793 & 91-1864 (7th Cir. July 24, 1992), slip op. 7 ("there is no requirement of direct evidence of willfulness (a requirement that would doom most plaintiffs' cases, since few employers leave a convenient record of their illegal intent)").

¹⁶ To prove willfulness the plaintiff must, of course, show an additional element—the employer's knowledge of or reckless disregard for the law. As explained above (see page 15, *supra*), that is not an empty requirement, even in individual discrimination cases. But any argument that to prove willfulness the plaintiff must adduce additional or more persuasive evidence that the employer acted intentionally and impermissibly on the basis of the plaintiff's age reduces the initial verdict on discrimination to an unacceptable finding that the employer was only "a little bit liable." Cf. *Gilliam*, 820 F.2d at 1390 (upholding liability but reversing willfulness finding, for that purpose evidently accepting the employer's business justification defense as plausible and sympathetic).

None of the "enhanced" standards devised by these courts of appeals in an effort to limit willfulness liability in individual discrimination cases comports with the statute, with logic, or with this Court's decision in *Thurston*. Nothing in *Thurston* suggests that the standard of "willfulness" that it announced, which is rooted in the language and legislative purpose of the statute, should not be applied to all ADEA cases; the structure of the statute, which draws no distinctions among different types of cases, implies that it should. The First Circuit's adoption of the *Thurston* standard, "without modification or qualification," Pet. App. A20, in individual discrimination cases such as this one should therefore be affirmed.

II. THIS COURT SHOULD NOT ADOPT A PER SE RULE ON WHETHER INTERFERENCE WITH PENSION RIGHTS IS EVIDENCE OF AGE DISCRIMINATION

A. The Question of Pension Interference as Posed by Petitioners Is Not Presented by This Case

Petitioners present a second question in this case: whether an employer's interference with the vesting of an employee's pension rights, in a plan where benefits vest after ten years of service and are not otherwise based on age, violates the ADEA. Pet. i. Neither the record nor the court of appeals' opinion indicates, however, that the outcome in this case was at any stage based, as petitioners suggest (Pet. 14), on the creation of "a *per se* rule equating pension status with age." Respondent in fact disavows any such argument.¹⁷ Resp. Br. in Opp.

¹⁷ Respondent appears to have argued not that interference with pension vesting should be equated with age discrimination, but that petitioners treated him in a way they would not or could not have treated a younger man: they tried to force him to sign a burdensome agreement, without resolution of his compensation claims, thinking that he would have to accept because "[t]hey

9 n.5, 14-15. The district court explicitly recognized that "the discharge of an employee in order to eliminate the employee's pension rights cannot, by itself, establish age discrimination," Pet. App. A55, and both the district court and the court of appeals recited a variety of different pieces of evidence in their opinions sustaining the jury's finding of liability.

In order to reflect the facts of this case, petitioners' second question must therefore be rephrased as whether evidence of interference with pension vesting may be used as some support for a finding of age discrimination. Given the limited role of pension evidence in the presentation of this case to the jury and the review of the verdict by the district court,¹⁸ however, we question whether this case presents even the reformulated question in the context most appropriate for consideration by this Court.

B. Interference With Pension Vesting May Be Evidence of Age Discrimination in Some Cases, Although the Opinion Below Relied Too Heavily on Such Evidence in This Case

Nevertheless, the court of appeals opinion, while not entirely clear on the relative weight given to the various items of evidence marshalled in support of the jury's ADEA verdict, does suggest that the court may have

had that pension hanging over him." C.A. App. 1054. See also Resp. Br. in Opp. 14 ("to the extent pension [vesting] was significant in this case, it was significant *because* of Biggins' age").

¹⁸ Nothing in the judge's instructions could have led the jury to believe that it should find an ADEA violation if it concluded that respondent was fired solely to prevent his pension rights from vesting. The court instructed the jury that for respondent to prevail on his ADEA claim "age must have been the determining factor" (C.A. App. 1086 (emphasis added)), and referred to pension vesting only in the instructions pertaining to ERISA. The district court's decision upholding the ADEA verdict expressly rejected (Pet. App. A55) the notion that pension interference by itself could establish age discrimination.

viewed the pension evidence as important. Although the court reviewed the two age-related comments urged by respondent as direct evidence of age-based animus, see page 3, *supra*, it stated (Pet. App. A13) that "[t]he most significant evidence on the ADEA claim comes from the facts and circumstances surrounding the termination of Biggins' employment." The court then briefly rehearsed the evidence involving the proffered confidentiality agreement, Biggins' salary demands, the terms accorded to Biggins' younger replacement, the timing of the termination with respect to the vesting of Biggins' pension, and the discussion of a potential consulting arrangement. In its concluding summary (Pet. App. A14), however, the court seemed to focus on the pension evidence:

Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.

Based on our review of the evidence, we find that it was within the province of the jury to decide whether age was a determining factor in the defendants' decision to terminate Biggins' employment.

As petitioners point out, Pet. 14-15, in this case evidence of interference with the vesting of respondent's pension could provide only weak support for a finding of age discrimination. Where, as here, the only criterion for vesting under a pension plan is a reasonably short period of service, and an employee's age is not a factor, there is little ground for inferring that an employer's intention to prevent an employee's pension from vesting is related to age, rather than to some other cause (or,

for that matter, simple bad blood).¹⁹ Similarly, respondent's apparent theory (see note 17, *supra*) that the choices offered him by petitioners, including the choice to resign and forfeit his pension rights, were particularly burdensome because of his age is, even if true, at best weak evidence of the motivation for petitioners' actions.

Thus, we agree with petitioners that the courts below should have given little weight to the pension evidence in this case—at least without carefully articulating a clear theory on which that evidence was relevant to respondent's ADEA claim. On the facts of the case, however, we doubt that either court below found the pension evidence determinative. Although not strong, the remaining evidence included both direct evidence of age-based animus—the comments concerning respondent's age—and considerable circumstantial evidence, revolving around respondent's compensation claims and petitioners' arguably differential treatment of younger employees, of a sort well suited to credibility judgments by the trier of fact and review by the district court.²⁰ The jury's verdict can therefore be sustained without reliance on the evidence of interference with respondent's pension rights. This Court may nonetheless wish to make clear the limited utility of such evidence in cases of this sort and remand the case

¹⁹ Interference with pension vesting of course violates ERISA, and indeed ERISA liability was imposed on petitioners in this case. 29 U.S.C. 1140; see Pet. App. A23-A24. In addition, a longer service requirement would present a more difficult age discrimination question. Interference with the vesting of pension rights requiring 30 years of service, for example, could realistically affect only older employees, and imminence of vesting under such a plan would correlate highly and suspiciously with age. See *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 62 (3d Cir. 1988). A policy requiring employees to retire after 40 years of service would similarly be highly suspect under the ADEA.

²⁰ See *Mathewson v. National Automatic Tool Co.*, 807 F.2d 87 (7th Cir. 1986).

to the court of appeals for further consideration in light of this Court's guidance.

Although the proffered pension evidence was of little relevance to the age discrimination claim in this case, we note that discrimination cases present a particularly wide variety of individual facts and circumstances. Several courts of appeals have held that in at least some such circumstances evidence of pension interference can be relevant evidence of age discrimination,²¹ and we think it would be unwise to mandate any per se rule prohibiting consideration of such evidence. The same argument applies to the other sorts of "age-correlated" evidence cited by petitioners which are likewise inevitably highly dependent for their relevance (or lack thereof) on the specific facts of individual cases.²² While it may be appropriate to caution lower courts to scrutinize the alleged relevance of all such evidence with particular care, we believe the weight to be accorded it should ultimately be left to the sound discretion of courts confronted with specific cases in which the relevant issues actually arise.

²¹ See, e.g., *Visser v. Packer Eng'g Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc); *Hansard v. Pepsi-Cola*, 865 F.2d at 1466 (evidence that employee was terminated seven months prior to vesting of pension benefits supported jury verdict on age claim); *White v. Westinghouse*, 862 F.2d at 62 (acknowledging case-by-case approach and holding additional retirement pension, earned by 30 years of service, closely related to seniority and to age).

²² Compare *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1208 (7th Cir. 1987) (use of high pay as proxy for age may be employed only on case-by-case basis where facts support its use) with *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986) (high salary not correlated with age where "primarily the result of promotions, merit raises based on [employee's] excellent evaluations, and * * * occupying a managerial position"). The varying results reached in such cases reflect the courts' sensitivity to variant fact patterns, not any conflict on matters of basic legal principle.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAZEN PAPER COMPANY, *et al.*,
v. *Petitioners,*
WALTER F. BIGGINS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT
ADVISORY COUNCIL AND THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
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IN THE
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HAZEN PAPER COMPANY, *et al.*,
Petitioners,

v.

WALTER F. BIGGINS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

**BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT
ADVISORY COUNCIL AND THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF PETITIONERS**

The Equal Employment Advisory Council ("EEAC") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief *Amici Curiae* in support of Hazen Paper Co., *et al.*, the petitioners in this case. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE *AMICI CURIAE*

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including over 250 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, aspects of EEO policies and requirements that apply to the employer-employee relationship.

Because of its interest in the application of the nation's employment laws, EEAC has filed over 120 briefs as *Amicus Curiae* before this Court, as well as over 180 other briefs before the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated as *Amicus Curiae* in cases involving the proper standard of proof required under the ADEA in order to recover liquidated damages in this Court. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe*, 486 U.S. 128 (1988).

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 200,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States

Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990); and *FMC v. Holliday*, 111 S.Ct. 403 (1990).

All of EEAC's members, the constituents of its trade association members, and many members of the Chamber are employers subject to the provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. Sec. 621 *et seq.*, and other various federal orders and regulations pertaining to nondiscriminatory employment practices and equal opportunity policies.

In the view of EEAC and the Chamber, the decision below improperly construes the standard for establishing a "willful" violation under the ADEA. This Court has held that the ADEA establishes a "two-tiered" liability scheme, and that a "willful" violation compelling a payment of liquidated damages cannot be found unless the plaintiff proves that the employer "knew" or acted with "reckless disregard" of whether its conduct violated the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-128 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). In the instant case, however, the First Circuit virtually ignored this second tier, thus eliminating the plaintiff's obligation to show that the employer's misconduct reached a higher threshold, such as being outrageous or egregious. Instead, the First Circuit held that a "willful" violation could be

established by a mere showing that age was a "determining factor" in the employer's decision—the same level of proof the Circuit uses to find any disparate treatment violation of the ADEA. (Pet. App. at A-20).

This decision improperly collapses the ADEA's two-tiered system into one standard for showing both a disparate treatment case and a willful violation. Indeed, the court below recognized that under its approach, in many cases merely establishing a prima facie case would bring an automatic finding of a willful violation—"in many cases [a finding that age was a "determining factor"] will result in a willful violation following hard on the heels of an ADEA violation. . ." (Pet. App. at A-20).

As potential respondents to charges of discrimination filed pursuant to the ADEA and other employment statutes, the members of the EEAC and the Chamber are concerned that the decision below may automatically expose them to double liability in virtually every case where a theory of disparate treatment is alleged. Thus, EEAC members and Chamber of Commerce members have a direct interest in the issues presented for the Court's consideration in this case.

Because of their experience with these issues, both EEAC and the Chamber are well-suited to brief the Court on the importance of the issues beyond the immediate concerns of the parties to this case. This brief brings matter to the attention of the Court that has not already been provided by the party briefs.

STATEMENT OF THE CASE

The underlying facts of this case are set forth in detail in the petitioners' brief. The facts of particular relevance to the *Amici Curiae* are set forth below.

Respondent, Walter F. Biggins, who had been employed by petitioner, Hazen Paper Company, since 1977 as a technical director, was discharged in the summer of 1986. At the time of his discharge, Biggins was 62 years old and had worked for Hazen Paper for nine and one-half years. The Company's pension plan, which covered Biggins, provided that employees vested in the plan after ten years of employment.

During the course of Biggins' employment, he developed a new process, for which he sought and received a salary increase in 1983. The next year, Biggins again sought an increase in his salary from \$44,000 to \$100,000. When the Company objected, it touched off a dispute that would continue to rage throughout Biggins' employment.

In addition to the compensation dispute, the Company learned that Biggins was engaged in a private business venture, which, it concluded, posed a conflict of interest with regard to his duties to the Company. Hazen officials therefore attempted to negotiate a "confidentiality agreement" which would have restricted Biggins' outside activities during his employment. In addition, the agreement contained a two-year non-competition clause with no severance pay. Biggins refused to sign the agreement unless he was given a substantial raise. Upon his refusal to sign the agreement, Biggins was terminated on June 13, 1986. His pension benefits would have vested a short time later.

Hazen then hired a younger man to replace Biggins. This new employee was required to sign a confidentiality agreement that provided for 100 days of severance pay and a six-month non-competition clause.

A jury found that Hazen Paper Company violated the anti-discrimination provisions of the ADEA and that the violation was "willful," thereby subjecting the Company to additional liquidated damages under the statute. (Pet. App. at A-6).¹ The district court granted the Company's motion for a judgment notwithstanding the verdict on the jury's finding that the violation was willful.

On appeal, the First Circuit Court of Appeals vacated the district court's JNOV order on the willfulness issue and reinstated the jury's liquidated damages award. (Pet. App. at A-15). The First Circuit recognized this Court's rule that a violation of the ADEA is not "willful" unless the plaintiff can show that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (Pet. App. at A-15, citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-28 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). But the court held that this standard was fulfilled if the plaintiff could establish that age was the "determining factor" in the employer's decision. (Pet. App. at A-20, 21).

The court refused to follow other circuits that have ruled that the employer's conduct must be "egregious" or "outrageous" in order to be found willful, even though it recognized that its lesser standard would result in a violation in many cases where only a mini-

¹ Citations to the Petitioners' Appendix are designated as (Pet. App. at —).

mal showing of disparate treatment had been established. (Pet. App. at A-20). Applying this standard to the instant case, the First Circuit found "strong evidence" of a willful violation in a company official's statement that he was absolutely aware that age discrimination was illegal. (Pet. App. at A-20). The court further noted that Biggins was discharged shortly before he would meet the ten-year service requirement for pension vesting. (Pet. App. at A-23).

SUMMARY OF ARGUMENT

By holding that a willful violation of the Age Discrimination in Employment Act may be established by a mere showing that age was the determining factor in the employer's decision, the First Circuit directly contravenes this Court's decisions in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The facts of this case comport squarely with those in *Richland Shoe* and should be guided by this Court's analysis in *Thurston* and *Richland Shoe*. *Thurston's* express rejection of the broad "in the picture" standard, which rejection was later upheld in *Richland Shoe*, should have guided the First Circuit to find that "willfulness" cannot be based upon the mere admission that the employer was aware that age discrimination is illegal. *Richland Shoe*, 486 U.S. at 133 n.9. In reversing the First Circuit's decision, this Court should clarify the definition of *Thurston's* "knew or showed reckless disregard" requirement by holding that additional proof of outrageous or egregious conduct is necessary to support a finding of willfulness.

That Congress provided for liquidated damages under the ADEA's enforcement scheme "only in in-

stances of willful violations" clearly indicates that more than a mere showing that age was "the determining factor" in an employment decision is required before liquidated damages may be assessed. "Willfulness" under the two-tiered liability scheme requires more than merely proving a disparate (i.e., intentional) treatment violation under the standards of *McDonnell Douglas v. Green*, 411 U.S. 792 (1972) to demonstrate that the employer knew its conduct violated the Act. To prove willfulness, the plaintiff must make an *additional* showing of conduct on the part of the employer that is more culpable. Indeed, if *Thurston* is so limited that a routine finding of a disparate treatment violation means that the employer acted "knowingly" or "recklessly," then the *Thurston* standard must be modified to require additional evidence of egregious or outrageous conduct in disparate treatment cases, as argued in the employer's brief.

The decisions of the Third and the Fifth Circuits in *Dreyer v. Arco Chemical Corp.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987), and *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989) correctly interpret *Thurston's* "knew or showed reckless disregard" standard as requiring a demonstration of outrageousness or egregiousness on the part of the employer—before a finding of willfulness can be made. These decisions are consistent with the Congressional purpose of awarding liquidated damages only against defendants who consciously violate the Act and with this Court's warning that willfulness cannot be based upon facts which harken back to the "in the picture" standard. Moreover, because this Court's standard requires proof in addition to that required to substantiate the

underlying violation, it is consistent with the plain language of the Act's enforcement provision and its legislative history. As such, the "outrageousness" or "egregiousness" requirement to prove a willful violation clearly preserves the two-tiered liability structure for "willful" and "non-willful" violations of the Act.

The decisions of lower courts that have construed the *Thurston* "knew or showed reckless disregard" test to require a showing of less than outrageous or egregious conduct have failed to preserve the ADEA's two-tiered liability framework. Just as this Court forewarned in *Thurston*, these decisions have resulted in the virtual automatic award of liquidated damages in age discrimination cases. Failure to reverse the lower court's decision in this case will throw age cases back to the discredited *Jiffy June* test rejected by this Court, thereby collapsing the ADEA's double-tiered standard into a single standard which assesses liquidated damages based upon a statement by the employer that he or she was aware that the Age Act prohibits age discrimination.

Finally, no inference of age discrimination arises just because when Biggins was discharged, he was 62 years old and his 10-year service requirement for pension vesting would have occurred shortly after his discharge. Service, not age, is the operative factor. If Biggins had started work at age 19, rather than age 52, the issue would not even arise. In any event, service cannot be used as a proxy for age, and the courts have ruled that the juxtaposition of a discharge decision and the date for minimum pension vesting is insufficient to prove age discrimination. *Visser v. Packer Engineering Associates*, 924 F.2d 655, 658 (9th Cir. 1991); *Pickering v. USX Corp.*, 758 F. Supp. 1460, 1462 (D. Ut. 1990).

ARGUMENT

I. THE LOWER COURT'S HOLDING IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *THURSTON* AND *RICHLAND SHOE* AND HAS THE EFFECT OF REVITALIZING THE *JIFFY JUNE* "IN THE PICTURE" STANDARD FOR THE ASSESSMENT OF LIQUIDATED DAMAGES THAT WAS EXPRESSLY OVERRULED IN *RICHLAND SHOE*

The Court Appeals below erred in holding that a "willful" violation of the ADEA may be established by a mere showing that age was a "determining factor" in the employer's decision. (Pet. App. at A-20). This holding directly contravenes this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 125 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), and attempts to push the law back to the "in the picture" standard of willfulness under the ADEA that was expressly rejected in *Richland Shoe*. The practical result of such a holding would be to nullify the ADEA's two-tiered structure of liability, and to render double damages automatic in virtually every case.

The ADEA, which prohibits discrimination in the workplace based upon age, Section 4(a), 29 U.S.C. Section 623(a); is enforced in accordance with the procedures provided under the Fair Labor Standards Act (FLSA), 29 U.S.C. Sections 201, *et seq.*, with certain notable exceptions. Pursuant to Section 7(b) of the Act,² liquidated damages are available to suc-

² Section 7(b) provides in relevant part:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this

cessful plaintiffs "only in cases of willful violations of this chapter." 29 U.S.C. Section 626(b). Thus, it is clear that Congress, by restricting liquidated damages under the ADEA to "willful" violations of the Act, intended in plain statutory language to limit the awarding of liquidated damages in ADEA cases.

In *Thurston*, a case which challenged the application of a company-wide plan under the ADEA, this Court interpreted Section 7(b) to require proof that "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S. at 126. The Supreme Court's examination of the legislative history of the Act revealed that Congress intended for liquidated damages to be punitive in nature.³ *Id.* Since the

section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter.* In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation. (Emphasis added).

³ The legislative history of the ADEA liquidated damages provision evidences the intent of its sponsor and Congress to limit the award of liquidated damages only to cases where employer actions are even more egregious or outrageous than those which characterize routine liability. As originally pro-

liquidated damages provision was substituted for [FLSA's] criminal penalties at Senator Javits' request, the Court reasoned that such damages were intended to provide a deterrent effect to future willful violations. *Id.*

Furthermore, the structure of the statute convinced the Court that Congress intended to provide for a two-tiered scheme of liability. *Id.* at 128. The first tier was designed to address non-willful liability. The second tier, that affords liquidated damages for willful violations, addresses those instances where the employer's actions are exceptionally serious to merit additional sanctions. As such, the Court noted that liquidated damages were not intended to be awarded in every case. *Id.*

Moreover, in *Thurston*, this Court expressly rejected the widely used "in the picture" test established in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972), which held that a violation is willful if the employer knew that the ADEA was "in the picture." *Thurston*, 469 U.S. at 128. Such a "broad" standard, this Court stated, would surely result in double damages in virtually every case. *Id.* Recognizing that the ADEA requires employers to post notices of the Act, the Court realized that it is virtually impossible for employers to be unaware that the ADEA is "in the picture." *Id.*

posed, the ADEA would have incorporated criminal penalties. 113 Cong. Rec. 2199 (1967). The substitution of the "willful" standard for liquidated damages was designed to serve the same purposes of deterring and punishing violators as the criminal provision would have served. See 113 Cong. Rec. 7076 (remarks of Senator Javits). See also *Thurston*, 469 U.S. at 125-126.

Three years later, upon re-examination of the liquidated damages provision contained in the Fair Labor Standards Act, this Court again rejected the "in the picture" test as the definition of willfulness, noting that it was not supported by the plain language of the Act. *McLaughlin v. Richland Shoe*, 486 U.S. at 134. The *Richland Shoe* opinion criticized the "in the picture" test of willfulness, noting that it "virtually obliterates any distinction between willful and nonwillful violations." *Id.* at 132-133. Thus, the *Richland Shoe* Court reaffirmed the *Thurston* analysis and embraced the ADEA's "knew or showed reckless disregard" standard as a uniform construction of the term "willfulness."

Thus, it would be contrary to the ADEA's burden of proof structure to allow a basic, *prima facie* showing of disparate treatment to be sufficient to demonstrate that the employer's conduct was "willful." Some courts have expressed puzzlement that an act of "intentional" discrimination could somehow not be "knowing" or "willful." The answer, however, can be analyzed as follows.

Thurston says that to be "willful", the employer either "knew" or "acted with reckless disregard" of whether its conduct violated the Act. The first prong—actual knowledge—is akin to a "smoking gun" where the evidence shows that the employer had actual knowledge that its conduct violated the Act and acted anyway. To prove that the employer knowingly violated the ADEA, the plaintiff cannot simply show that the employer was aware of the ADEA or that a disparate treatment claim has been established. No knowing violation has been proven here. The second prong looks to whether the employer acted with "reckless disregard." Again, to have a "two-tiered"

scheme in the context of this Court's burden of proof decisions, a "knowing" or "reckless" decision must be more than a finding that the employer committed an "intentional" discrimination as that "term of art" is used in employment discrimination cases.

In employment discrimination law, "intentional" discrimination can mean any case that is not a disparate impact case. As such, it applies to almost every individual discrimination suit. Where there is no direct evidence of age discrimination, the courts use the burden of proof construct established by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). See generally, *Thurston*, 469 U.S. at 121. Using this standard to prove intentional (i.e., disparate treatment) discrimination does not mean that there was proof that the employer intended to violate the law. To the contrary, this scheme orders the relative proof burdens to determine whether discrimination can be inferred in the *absence* of such direct evidence of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-57- (1981). Indeed, the plaintiff's "burden of establishing a prima facie case of disparate treatment is not onerous." *Id.* at 253.

In a case such as here, once the plaintiff meets the initial burden, the employer must come forward with a legitimate, nondiscriminatory reason for its conduct, and the plaintiff can attempt to prove that the employer's stated reasons are pretextual. The jury then weighs all the evidence (which will be close in many cases) and decides whether a disparate treatment case can be found. This will be the burden of proof scheme in *every* disparate treatment case, and if *any* violation under this scheme is sufficient also to prove that the employer "knowingly" or "willfully" violated the Act, then *every* violation will be "willful"—a clear

misapplication of the *Thurston* standard. Indeed, it would be ironic and illogical to use a two-tiered system in *Thurston* where the employer's policy was "discriminatory on its face" (469 U.S. at 121), and then to allow a finding of "willfulness" in a balancing-of-the-evidence, *McDonnell Douglas* type case where there is no such direct evidence of age discrimination.

We concur with the employer's arguments that if the *Thurston* standard means that any finding of "intentional" discrimination means that the employer's conduct was a "knowing" violation, then the *Thurston* standard will have to be modified to allow for a two-tiered system in disparate treatment cases. If *Thurston* is so limited, then, as the employer argues, something more must be shown than that the employer simply knew or showed reckless disregard that its conduct violated the ADEA. Thus, any formulation of the definition of "willfulness" must require that in addition to a basic disparate treatment finding, the employer's conduct must in some *further* sense have been outrageous or egregious, such as where there is "smoking gun" evidence, or where the employer has routinely or repeatedly discriminated against older persons through a pattern of oppressive treatment.

II. THE MAJORITY OF THE COURTS OF APPEALS HAVE CORRECTLY INTERPRETED THURSTON'S "KNEW OR SHOWED RECKLESS DISREGARD" TEST OF WILLFULNESS TO REQUIRE CONDUCT ON THE PART OF THE EMPLOYER THAT IS "OUTRAGEOUS" OR "EGREGIOUS"

In accordance with this Court's reasoning in *Thurston* and *Richland Shoe*, several lower courts have correctly interpreted the "knew or showed reckless disregard" language of *Thurston's* willfulness test to

require more evidence than the mere admission that the employer was "aware that age discrimination was illegal." In fact, several courts properly require evidence of outrageous or egregious conduct. In keeping with *Thurston* and *Richland Shoe*'s mandate to preserve the two-tiered liability system, such a standard best maintains the distinction between non-willful and willful violations. In addition, such a standard is consistent with the *Thurston* Court's statement that liquidated damages are "punitive in nature" and should be assessed in limited circumstances. *Thurston*, 469 U.S. at 125.

In *Dreyer v. Arco Chemical Corp.*, 801 F.2d at 657, for example, the Third Circuit interpreted the *Thurston* "knew or showed reckless disregard" standard to require a proof that the employer's conduct was "outrageous."⁴ Reasoning that the essence of liquidated damages is punishment for "conduct that is outrageous," the Third Circuit held that outrageous conduct on the part of the employer should satisfy the "knew or showed reckless disregard" test for liquidated damages set forth in *Thurston* and *Richland Shoe*. *Id.* at 657-658. See also *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989); *Kelly v. Matlack, Inc.*, 903 F.2d 978 (3d Cir. 1990); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 346 (3d Cir. 1990) ("There must be 'some additional evidence of outrageous conduct' that distinguishes this from the ordinary, though still reprehensible, case of age discrimination"); and *Bruno v. W.B.*

⁴ In *Dreyer*, the plaintiffs were terminated in a reduction of force in which the plaintiffs' department was reduced from 26 employees to eighteen employees. 801 F.2d at 652-653. A jury found that their terminations were both intentional and willful. *Id.*

Saunders Co., 882 F.2d 760 (3d Cir.), *cert. denied*, 110 S.Ct. 980 (1989).

The Fifth Circuit, moreover, has fashioned a similar test. In *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989), the court noted that the Supreme Court has held that liquidated damages are a serious sanction and should be reserved for the most "egregious" violations where the defendant acted "knowingly and recklessly." Thus, the Fifth Circuit requires a showing of egregiousness on the part of the employer in order to trigger liquidated damages under the ADEA. *Id.*

Even those circuits which do not explicitly require an element of outrageousness or egregiousness do require evidence that approaches the higher threshold of these standards. For instance, the Fourth Circuit, in applying the "knew or showed reckless disregard" test, noted *Dreyer*'s rule requiring outrageous conduct and agreed that something more than "a retrospective finding that there was a simple violation of the statute for proof of willfulness" was required. *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390 (4th Cir. 1987). See also *Taylor v. Home Insurance Company*, 777 F.2d 849 (4th Cir.), *cert. denied*, 476 U.S. 1142 (1985).

The Eighth Circuit also requires more than just evidence of age-based bias in order to trigger an award of liquidated damages. See *Beshears v. Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991). The Eighth Circuit will uphold a finding of willfulness "if the people making the employment decision know that age discrimination is unlawful, and if there is *direct evidence*—more than just an inference from, say

an arguably pretextual justification—of age-based animus, the trier of fact may properly find willfulness.” *Id.* (emphasis added). See also *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989).

These cases illustrate that the ADEA’s two-tiered liability standard requires a test which makes a realistic distinction between a non-willful violation and a willful violation. The standard articulated by the Third and the Fifth Circuits, a requirement of some element of outrageous or egregiousness on the part of the employer, is consistent with this Court’s teachings of *Thurston* and *Richland Shoe*. In keeping with Congress’s directive that the Act create a two-tiered liability scheme, the “outrageous” or “egregious” standard will ensure that an award of liquidated damages be based on evidence that does not merely duplicate that needed for make-whole relief. *Dreyer*, 801 F.2d at 658. Moreover, a definition of “knew or showed reckless disregard” which requires a showing of outrageousness or egregiousness will prevent a harkening back to the *Jiffy June* standard, which permitted liquidated damages merely because the employer was aware that age discrimination was illegal. Thus, in accordance with the dictates of *Thurston* and *Richland Shoe*, the “outrageous” or “egregious” test successfully maintains a second tier of liability that is based upon the more culpable nature of the employer’s conduct. See *Thurston*, 469 U.S. at 125; *Richland Shoe*, 486 U.S. at 132-133.

III. A LESSER STANDARD THAN THAT REQUIRING “OUTRAGEOUSNESS” OR “EGREGIOUSNESS” HAS THE PRACTICAL EFFECT OF COLLAPSING THE ADEA’S TWO-TIERED SYSTEM INTO ONE STANDARD FOR BOTH “WILLFUL” AND “NON-WILLFUL” VIOLATIONS

A willfulness test that requires no more than a showing that the employer knew that age discrimination was prohibited by law contravenes this Court’s decisions in *Thurston* and *Richland Shoe*. Furthermore, a standard that fails to raise the level of prohibited conduct up to “egregiousness” or “outrageousness” will not serve to make realistic distinctions between non-willful liability and willful liability, but instead will make it virtually impossible for juries to distinguish between the two. Lower courts that interpret the “reckless disregard” standard in such a manner have effectively obliterated the ADEA’s two-tiered system of liability and have equated non-willful and willful violations. No better example could be found than in the decision of the First Circuit below. After adopting its “determining factor” standard, the court stated:

We now apply the standard to this case. The principal owner of the company, Thomas Hazen, testified that he was “absolutely” aware that age discrimination was illegal. *This is as strong evidence of a knowing violation of ADEA as a plaintiff could wish.*

(Pet. App. at A-20) (emphasis added). Thus, in the First Circuit’s view, it is sufficient that the employer be aware of the ADEA in order for conduct to be willful.

Such a standard is exactly what was rejected in *Richland Shoe*, where this Court used the following

fact situation from the district court's opinion as the example of how the courts had *incorrectly* applied the willfulness standard:

"The [company official] was aware that the FLSA existed and that it governed overtime systems such as that used for the Richland mechanics. . . . Thus, although [he] did not state that he thought that the system used was contrary to the provisions of the FLSA, *he did state that he knew that the FLSA applied. I believe that this admission is sufficient to satisfy the liberal willfulness requirement of the FLSA.*" *Donovan v. Richland Shoe Co.*, 623 F.Supp. 667, 671 (E.D. Pa. 1985).

Richland Shoe, 486 U.S. at 133 n.9 (emphasis added). Clearly, then, the court below was incorrect when it applied the "determining factor" test to mean that the employer had acted recklessly just because its officer knew that the ADEA applied to its operations.

The tendency of some lower courts to eviscerate this Court's "reckless disregard" standard is further illustrated by the Eleventh Circuit's decisions in *Lindsey v. American Cast Iron Pipe Co. (ACIPCO)*, 810 F.2d 1094 (11th Cir. 1987), and *Formby v. Farmers & Merchants Bank*, 904 F.2d 627 (11th Cir. 1990). In *Lindsey*, the plaintiff alleged that his employer failed to promote him because of his age. *Id.* at 1096. The Eleventh Circuit found that the employer "willfully" violated the ADEA based upon the admission that ACIPCO knew that the ADEA barred employment decisions based upon age. *Id.* at 1101.

Applying the same analysis in *Formby*, the court upheld a finding of willfulness premised on evidence that the jury did not believe the employer's explanation with regard to the plaintiff's discharge and *was*

aware that the ADEA prohibited discrimination on the basis of age. Formby, 904 F.2d at 632. As demonstrated by these two cases, there is no practical difference between the standard applied by the Eleventh Circuit and the *Jiffy June* "in the picture" standard that was criticized and abolished in *Thurston* and *Richland Shoe*. Thus, the Eleventh Circuit's failure to interpret "reckless disregard" as requiring conduct more culpable or egregious has resulted in the same standard under the Age Act for non-willful and willful violations that was abolished by *Richland Shoe*.⁵

In disparate treatment actions, such as the cases discussed above and this case, the approaches outlined above have resulted in the nearly automatic imposition of liquidated damages where a violation of the Act is found. Clearly, this result is in direct conflict with the ADEA's two-tiered liability standard. *See Thurston*, 469 U.S. at 128; *Richland Shoe*, 486 U.S. at 132-133.

IV. THE MERE PROXIMITY OF PLAINTIFF'S PENSION VESTING DATE IS NOT EVIDENCE THAT HIS AGE WAS A FACTOR IN HIS DISCHARGE

As shown above, the court below improperly made a garden-variety disparate treatment finding into a "willful" violation. The First Circuit made another serious error when it leaped to the presumption that

⁵ This point is aptly illustrated by one commentator's observation that liquidated damage awards have been upheld in virtually every case decided by the 11th Circuit. Ennis & Kelly, *The Standards for Awarding Liquidated Damages under the Age Discrimination in Employment Act—A Need for Uniformity*, 17 Employee Relations L. J. 237, 238 (Autumn 1991).

age was a factor in Biggins' discharge merely because he was approaching the vesting date of his pension rights. The court stated: "If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting" (Pet. App. at A-14). Put in those terms, an inference of age discrimination would arise whenever an employer took an adverse employment action against any employee age 40 or older who had worked long enough to approach the vesting date. Such a result, however, is insupportable. For example, if Biggins had started working for the employer at age 19, his pension would have vested at age 29. His age, therefore, comes into play only in the sense that he started working at age 52 and was 62 years old ten years later. Age *per se* however, had no bearing on his pension eligibility, and at best is a factual coincidence that of itself is not probative of age discrimination.

As the courts have held, the mere juxtaposition of a discharge decision alongside the employee's proximity to pension vesting is insufficient to support an inference of age discrimination. *Harvey v. I.T.W., Inc.*, 672 F. Supp. 973, 975 (W.D. Ky. 1987). And even assuming that the company officials are aware of the proximity of these two events:

a trier of fact may not infer action from knowledge alone. Otherwise every worker who lost his job within months, or perhaps years, before the full vesting of his pension would have a prima facie case of age discrimination.

Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 658 (9th Cir. 1991). See also *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 390 (3d Cir. 1990) ("Nor can we turn the company's decision to lay off employees during economic difficulties into an intention to violate ERISA").

In addition, no inference of age discrimination can arise just because Biggins would reach a certain age (here age 62) when he would have been working for ten years—the minimum vesting requirement. The operative standards have been spelled out as follows:

Even assuming *arguendo* the defendants terminated [the plaintiff] to prevent his pension rights from fully vesting, this would not be probative of age discrimination since it goes to tenure with the company, not age. A young person who has been with the company for a long time may very well be closer to a fully vested pension than an older person who just started work there recently.

Harvey v. I.T.W., Inc., 672 F. Supp. at 975. Plaintiff's age and his vesting date thus were improperly linked to raise an inference of age discrimination:

Plaintiffs' protestations that age and pension eligibility are "inexorably linked" are belied by the actual terms of the pension plan in this case. [Record reference omitted]. As is true of most pension plans, years of service—rather than age—is the primary factor in determining benefits eligibility. Absent some specific evidence of disparate treatment on the basis of age, the mere fact that older employees may have had more years of service than younger employees does not automatically convert the alleged pension benefits discrimination into age discrimination.

Pickering v. USX Corp., 758 F. Supp. at 1462.⁶

⁶ *White v. Westinghouse*, 862 F.2d 56 (3d Cir. 1988) is inapplicable to the instant case. The Third Circuit held that the district court improperly granted the employer's motion for summary judgment on the issue of whether White was discharged as a pretext for avoiding two additional years of pension benefits. The Third Circuit noted that "White alleges that his numerous requests to extend his termination date to

As set forth fully in the petitioners' brief, there is no direct or circumstantial evidence that "pension costs played a role in the decision to fire" Biggins. *Visser v. Packer Engineering Associates*, 924 F.2d at 658. The conclusory statement of the plaintiff that he was discharged to avoid his pension vesting is not sufficient to support the plaintiff's case. *Harvey v. I.T.W.*, 672 F. Supp. at 975.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully submit that the First Circuit's decision should be reversed.

Respectfully submitted,

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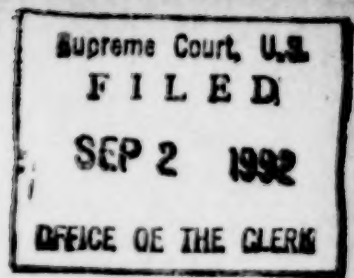
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August 6, 1992

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allow completion of 30 years of service were either ignored or denied." White was not discharged for cause as was Biggins, but rather was terminated during a reduction in force at 29¾ years of service. The Third Circuit did not decide that the employer had committed age discrimination, but rather ordered the case to trial on this issue. As the Seventh Circuit has noted in "declin[ing] to rule that pension considerations always operate [as a proxy for age]," this issue "should be examined on a case-by-case basis." *Wheeldon v. Monon Corp.*, 946 F.2d 533, 536 (7th Cir. 1991).

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On Writ of Certiorari to the
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BRIEF AMICUS CURIAE
OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION (NELA)
IN SUPPORT OF RESPONDENT

The National Employment Lawyers Association respectfully submits this brief amicus curiae in support of Respondent in this case. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a nationwide bar association of over 1200 lawyers who represent individual employees. Its membership comprises a large segment of the leaders of the plaintiffs' bar who specialize in employment discrimination cases. Founded in 1985 and headquartered in San Francisco, California, NELA has members in 49 states. Because of its interest in the application of employment law, NELA has filed several amicus briefs in this Court as well as briefs before the Circuit Courts of Appeals and various State Supreme Courts.

Most of NELA's members regularly handle age discrimination cases. Many of NELA's members specialize in age discrimination practice.

Petitioners request this Court to legislate

a new standard to govern the award of liquidated damages in Age Discrimination in Employment Act (ADEA) cases. In addition to meeting the present "knew" or "reckless disregard" standard, the employee, according to petitioners, must show "that the employer's actions were repeated, without colorable justification, or were otherwise harsh, egregious or outrageous." (Petitioners' Brief at 47).

NELA disagrees. This Court should adhere to its recent well reasoned rulings in the Thurston and McLaughlin cases. This Court should resist efforts to create a new standard that has no basis in either this Court's rulings, legislative history or public policy.

Because of its practical experience with the issues at bar, NELA is well suited to brief this Court on the importance of the issue beyond the

immediate concerns of the parties to this case.

STATEMENT OF THE CASE

NELA's brief is confined to the issue raised by the decision of the First Circuit "to adopt without modification or qualification" the test for "willfulness" set forth by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985):

A violation is "willful" if 'the employer either knew or showed reckless disregard for the effect of whether its conduct was prohibited by the ADEA.'

Petitioners seek to modify the "knew" or "reckless disregard" test by adding heightened employer-protective standards, previously

rejected in Thurston. Petitioners claim the present standard improperly promotes an automatic doubling of damages in every case. They would permit liquidated damages only for "those cases involving the most flagrant violations of the law". (Brief for Petitioners at 47). Respondent disagrees, arguing that the current standard adequately preserves Congress' desire for a "two tier" approach, distinguishing ordinary and "willful" violations.

According to Respondent, the deterrent and compensatory purposes of liquidated damages are best served by the "knew" or "reckless disregard" standard. Respondent says there is nothing in public policy or legislative history to justify a tortured expansion of the statutory word "willful", to mean "outrageous".

SUMMARY OF ARGUMENT

This Court in Thurston rejected efforts to move the definition of "willful" closer to the traditional "bad purpose" test for imposing punitive damages. At the same time this Court pointed out circumstances where "reasonable" and "good faith" efforts of the employer to follow the law could insulate the employer from a finding of "willful" violation. The Court in Thurston and McLaughlin was satisfied that the "knew" or "reckless disregard" standard provided a proper demarcation between "ordinary" and "willful" violations that serves the purposes of the liquidated damages provision.

The "two-tiered system" envisaged by Congress was not designed to establish any particular percentage of "willful" versus non-willful violations. There is no legislative

history suggesting that liquidated damages should only be awarded in a very few cases or only in "outrageous" cases. To the contrary, legislative history shows that in addition to the deterrent purpose, one of the purposes of the liquidated damages provision was compensatory, designed to make up for non-pecuniary losses. Further, Congress was well aware of the option of using the words "punitive" or "malicious" but rejected the higher standard in favor of the "willful" language, which imposes a lesser burden on plaintiff. Thus, there is ample support for this Court's prior rejection in Thurston of an "evil motive or bad purpose" standard or of the necessity of showing Defendant "intended to violate the Act". Thurston, 469 U.S. at 126 n.19.

Petitioners argue that the Thurston - McLaughlin standard means that the doubling of

damages will be automatic in every disparate treatment case. Not so. Cases like Thurston, where the Company promulgated a policy discriminatory on its face, provide a good example where "reasonable", "good faith" reliance on legal advice may provide a legitimate defense to the claim of a "willful" violation. Other examples are reasonable good faith reliance on statutory exceptions such as the BFOQ, benefit plan, seniority, good cause, and coverage defenses.

Frequently, disparate treatment cases involve a showing of "intent" to discriminate by direct, circumstantial or indirect evidence. However, there are many ADEA cases in which age is a determining factor causing illegal discrimination where there may be no showing of intent. An employer's unconscious stereotyping,

reliance on cost cutting motives, or negligent review of lower level biased recommendations may cause illegal discrimination, but may not necessarily involve a willful violation. Thus, the fear of an automatic doubling of damages in every case is not justified.

In sum, there is no reason to reverse the 1984 and 1988 holdings of this Court in Thurston and McLaughlin. There is no need to "modify" the "knew" or "reckless disregard" standard. The addition of a new "outrageous" standard, created out of thin air, would unfairly deprive victims of age bias of appropriate relief and would diminish the deterrent desired by Congress.

ARGUMENT

I. Adding A New Heightened "Outrageous" or "Egregious" Standard Contravenes This Court's Rulings, And Is Unsupported By Legislative History, Public Policy, Or The Plain Meaning Of The Statute.

In Loeb v. Textron Inc., 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) the court held that an employee had to establish that the employer had specific intent to violate the ADEA in order to receive liquidated damages. This Court in Thurston disagreed and said, "We do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA". Thurston, 469 U.S. at n.19. Furthermore, the Court in Thurston adopted the position that an employer's action may be "willful" "even though he did not have an evil motive or bad purpose". Id.

The Thurston case stands for the proposition that the distinction between "ordinary" and "willful" violations is not whether the violation was "flagrant" or "malicious" or "outrageous", but rather, whether the employer had knowledge that its conduct was in violation of law. The McLaughlin case, decided only four years ago, reaffirmed the Thurston rule as a satisfactory explanation of "willful" violations in Fair Labor Standard Act (FLSA) cases. "Ordinary" violations included conduct that was merely negligent or based on a "good-faith but incorrect assumption" as to the law. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 135 (1988). This Court noted in McLaughlin:

The standard of willfulness that was adopted in Thurston - that the employer either knew or

showed reckless disregard for the matter of whether its conduct was prohibited by statute-is surely a fair reading of the plain language of the Act.

Id. at 133.

Now the petitioners seek to modify the Thurston-McLaughlin approach and engraft a new requirement. They would force an employee to show not only knowledge or "reckless disregard," but also that "the employer's actions were repeated, without colorable justification, or were otherwise harsh, egregious, or outrageous." (Petitioners' Brief at 47). Neither the plain meaning of "willful", nor the authorities which have interpreted "willful" in many other statutes justify such a result. The petitioners' efforts are but another attempt to

resurrect the "bad purpose", "evil motive" standard rejected in Thurston.

Petitioners correctly note that liquidated damages were intended as a deterrent to prevent employers from violating the law. However, another purpose was compensatory. In its comments attached to the 1978 amendment of the ADEA, Congress specifically stated that liquidated damages were intended to "compensate the aggrieved party for non-pecuniary losses arising out of a willful violation of the ADEA". H.R. Conf. Rep. No. 950 95th Cong., 2d Sess. 13-14 (1978) reprinted in 1978 U.S.C.C.A.N. 504, 528, 535. Furthermore, the Committee Report noted that "the ADEA as amended by this Act does not provide remedies of a punitive nature". Id. In Overnight Motor Transportation Company, Inc. v. Missel, 316 U.S. 572, 583-84 (1942), this Court

noted that one purpose of liquidated damages in FLSA cases was to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."¹ This compensatory purpose would be thwarted if liquidated damages were only available in a few flagrant cases as proposed by petitioners.

It is simply inaccurate to equate liquidated damages with normal "punitive damages" like those available in Section 1981 and Section 1983 cases. (See EEOC brief at 20 n.11). There, the damages are uncapped. Under the ADEA, the

¹The lower federal Courts have held there is no recovery for compensatory, emotional, pain and suffering, or consequential damages Dean v. American Security Ins. Co. 559 F.2d 1036 (5th Cir. 1977) and in many cases only limited or no prospective damages are available. See e.g. Davis v. Combustion Engineering Co., 742 F.2d 916 (6th Cir. 1984).

Plaintiff is limited to an amount equal to the backpay due at date of trial, which normally may be a very modest amount. There is no windfall for the Plaintiff. There is no large financial exposure for the Defendant. There is no policy factor justifying limiting punitive charges to a few "outrageous" or "flagrant" cases.

- II. The present "knew" or "reckless disregard" standard preserves the ADEA's two tiered system, distinguishes ordinary and "willful" violations and prevents any automatic doubling of damages.

Petitioners fear that retention of the Thurston rule will mean an automatic doubling of damages in all cases. Not so. As the Court provided in McLaughlin:

If an employer
acts reasonably in

determining its
legal obligation,
its action cannot
be deemed willful
. . . . If an
employer acts
unreasonably, but
not recklessly, in
determining its
legal obligation,
then . . . it
should not be
[considered
willful] under
Thurston

McLaughlin, 486 U.S. at 135 n.13.

Trial judges give similar instructions pointing out that good faith employer actions that are unreasonable but not reckless are not necessarily "willful".²

Unconscious stereotyping of an older worker's abilities violates the Act but may not

²"[G]ood faith, as well as reasonableness, clearly are factors which go into the computation of willfulness." 3 Howard C. Eglit, Age Discrimination 18-80 (1990).

be "willful". EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1458 (7th Cir. 1992); Syvock v. Milwaukee Boiler Manufacturing Co., 665 F.2d 149 (7th Cir. 1981). Another example is when the employer's decision to terminate a high salaried older worker is motivated solely by its desire to cut costs by replacing Plaintiff with a younger employer. See, e.g., Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987). Another frequent situation is when the articulated reason, although pretextual, would not have put upper level management, who reviewed the claim, on notice of discrimination. Blake v. J.C. Penney Co., 894 F.2d 274 (8th Cir. 1990). Furthermore, where an ADEA violation is merely "in the picture" the violation is not willful. Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298,

1304-05 (7th Cir. 1990).

In addition, employers who discriminate may nevertheless reasonably raise affirmative defenses, which permit a non-willful finding.

Examples are:

- 1) Bona Fide Seniority System Defense, (29 U.S.C. Section 623(f)(2)(A));
- 2) Bona Fide Occupational Qualification (BFOQ) Defense (29 U.S.C. Section 623(f)(1));
- 3) The defense of no coverage because Plaintiff is a high ranking executive (29 U.S.C. Section 623) or Defendant has less than 20 employees (29 U.S.C. Section 630(b));
- 4) Bona Fide Employee Benefit Plan Defense (29 U.S.C. Section 623(f)(2)(B)).

An ADEA plaintiff can establish age discrimination without specific evidence of the employer's state of mind and without a showing of

specific intent to violate the law. Burlew v. Eaton Corp., 869 F.2d 1063 (7th Cir. 1989). As stated by the court in Brown v. M & M/ Mars, 883 F.2d 505 (7th Cir. 1989):

It is possible that the relevant decision maker might not know about ADEA's prohibitions. More likely is a situation in which a low-level supervisor withholds any facts that might lead the relevant decisionmaker, higher up in the chain of command, to suspect discrimination. In either of these two cases, a jury could reasonably conclude, depending on all the circumstances present, that the employer's action was not willful.

Id. at 514.

Disparate impact cases, which require no proof of intent to discriminate, obviously do not necessarily lead to a finding of "willful" violation. An example is where the employer uses subjective methods of selection for a reduction in force. If the Plaintiff proves that employees age 40 or over are adversely affected, then the issue is whether there was "business necessity" for the method or whether other alternative methods were available. A finding of liability does not focus on "intent" to violate the law. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

The Thurston case was not a disparate impact case because the policy covering treatment of 60 year old pilots was not neutral on its face but was age biased on its face. Nevertheless,

the Court in Thurston held there was no willful violation primarily because Defendant acted on the advice of legal counsel.

Legislative history derived from the Fair Labor Standard Act suggests that Congress intended liquidated damages to be awarded with more frequency than for traditional "punitive" damages available in Section 1981 and Section 1983 cases. The "willful violation" standard provides a lower burden of proof. Thus, it should be no surprise that many liability verdicts are accompanied by a finding of "willful" violation. As noted by the First Circuit, it is the "nature of the beast." Biggins v. Hazen Paper Co., 953 F.2d 1405, 1415 (1st Cir. 1992). More times than not, disparate treatment cases involve conduct which meets the "knew" or "reckless disregard" standard. The

commonality of "willful" misconduct is no reason to make the misconduct less blameworthy. But as previously shown there are many cases where the jury reasonably will not find a "willful" violation. Thus petitioners' fears of "automatic doubling" of damages are groundless. In all events, a large proportion of "doubling" verdicts alone is no justification for modifying an otherwise valid standard which is in accord with the purpose of the statute, its legislative history, and the plain meaning of the word "willful".

CONCLUSION

For the foregoing reasons, Amicus Curiae, National Employment Lawyers Association (NELA), respectfully submits that this Court should reject petitioners' contention that a new,

unnecessary, and illogical "outrageous" test be added to the well settled, salutary and balanced "knew" or "reckless disregard" standard.

Amicus Curiae submits that the First Circuit's decision should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing brief were served by U.S. Mail, first class, postage prepaid, to the following counsel, John M. Harrington, Jr., Robes & Gray, One International Place, Boston, MA, 02110, Counsel for Petitioners, and John J. Egan and Maurice Cahillane, 67 Market Street, Springfield, MA, 01102, Counsel for Respondent on this 3 day of September, 1992.

I further certify that one copy of this brief was mailed to each of the counsel for Amici, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC, 205; Donald R. Livingston, General Counsel, Equal Employment Opportunity Commission, Washington, D.C., 20507; Douglas S. McDonell, attorney for

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13
No. 91-1600IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, *et al.*,
Petitioners,
v.WALTER F. BIGGINS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

**BRIEF AMICUS CURIAE OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
IN SUPPORT OF RESPONDENT**

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OCTOBER TERM, 1992

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On Writ of Certiorari to the
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BRIEF AMICUS CURIAE OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose.

More than one-third of AARP's thirty-four million members are employed, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA). One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and poli-

cies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

AARP concurs with the arguments set forth by respondent in his brief and will not repeat those arguments here. Rather, AARP's brief will focus on how the *Thurston* standard properly implements the ADEA's two-tiered liability scheme. Given the potential ramifications of this case for victims of age discrimination, AARP submits its brief *amicus curiae*¹ to facilitate a full consideration by the Court of this issue.

STATEMENT OF THE CASE

AARP adopts the Respondent's statement.

SUMMARY OF ARGUMENT

This case involves virtually the identical issue² resolved by this Court less than eight years ago in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)—the proper standard for determining willfulness in an ADEA disparate treatment case.³ A unanimous Court in

¹ The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

² Petitioners also present a second issue concerning pension vesting. As discussed in Argument II, *infra*, AARP submits that this case does not present the issue articulated by petitioners in their Petition for a Writ of Certiorari, or even the issue as recast by petitioners in their brief on the merits.

³ The arguments presented by petitioners in this case echo those made by the *Thurston* petitioners, who warned that "any time there is a finding of disparate treatment (even when it is inferred), liquidated damages automatically result." Petitioners' Brief at 31, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (No. 83-997) (emphasis in original). See Petitioners' Brief at 6, *Hazen Paper Co. v. Biggins*, (No. 91-1600), arguing that the reckless disregard standard "authorizes such damages in every case where disparate treatment is found under the ADEA." (Emphasis in original).

Thurston rejected arguments that equated proof of willfulness with proof of underlying intent to discriminate, as urged by petitioners here. The Court held that a violation of the ADEA is willful when the "employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S. at 126.

The only distinction put forth by petitioners between this case and *Thurston* is that the facts here involve an individual case of discrimination, whereas *Thurston* challenged discrimination in a company policy. Thus, the question is whether the standard for willfulness should depend on the nature or scope of the employment decision. AARP respectfully submits that the creation of different standards of willfulness based on whether the employer acts against one individual or many is illogical. Moreover, petitioners' attempt to redefine "willful" as requiring proof of outrageous conduct in individual cases is contrary to the statutory language and purposes of the ADEA's liquidated damages provision.

The *Thurston* standard effectively implements the ADEA's two-tiered liability scheme and fully comports with the language, structure, and purposes of the ADEA. This case presents no reason to diverge from that standard.

I. THURSTON'S KNOWING OR RECKLESS DISREGARD STANDARD PROPERLY IMPLEMENTS THE TWO-TIERED LIABILITY SCHEME OF THE ADEA.

A. The Knowing Or Reckless Disregard Standard Maintains The Distinction Between Intentional Discrimination And A Willful Violation Of The ADEA.

Petitioners contend that the *Thurston* standard does not "fit" individual disparate treatment cases. Petitioners' Brief at 38. The flaw in petitioners' argument is its failure to distinguish between proof of an employer's in-

tent to discriminate and proof of the employer's knowledge that his specific conduct is prohibited by the ADEA. The *Thurston* standard recognizes this critical distinction, and properly implements the two-tiered liability scheme for damages crafted by Congress. 469 U.S. at 128.

The first tier of liability under the ADEA examines whether the employer treated the employee differently based on age.⁴ If age was a determining factor in the employment decision, then the employer has violated the ADEA and is liable for ordinary damages.⁵ Employers who discriminate but act reasonably (or even unreasonably) in determining their legal obligation incur only first-tier liability. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988). Disparate treatment, standing alone, does not render an employer liable for liquidated damages.

The second tier of liability requires proof of a willful violation. 29 U.S.C. § 626(b). To prove willfulness, the employee must show that the employer made the employment decision knowing his conduct violated the ADEA, or that the employer acted with reckless disregard for whether his conduct was prohibited by the ADEA. *Thurston*, 469 U.S. at 126. The second tier of liability subjects employers to double damages when they do not make any reasonable effort to determine whether their actions would constitute a violation of the law. *Thurston*, 469 U.S. at 126, citing *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951).

⁴ Proof of differential treatment varies from case-to-case and may be shown by direct evidence, *Thurston*, 469 U.S. at 121, by circumstantial evidence under the *McDonnell Douglas* test, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), or by disparate impact. *Holt v. Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986).

⁵ S. Rep. No. 723, 90th Cong., 1st Sess. 7 (1967) ("The purpose of this legislation, simply stated, is to insure that age . . . is not a determining factor . . .").

The key to the "knowing or reckless disregard" standard is its focus on the employer's consideration of whether his employment decision in a particular situation is prohibited by the ADEA. General knowledge of the existence of laws against age discrimination would not satisfy the "knowing" prong of the standard.⁶ Rather, the inquiry must focus on the employer's knowledge as applied to the specific discriminatory conduct challenged by the employee,⁷ which will vary from case-to-case.

Thurston itself illustrates the distinct inquiries required by the two tiers of liability which separate intentional discrimination from a willful violation of the law. As to the first tier of liability, the Court found that TWA's decision to adopt an age-based transfer policy intentionally discriminated against older pilots. 469 U.S. at 121. In assessing willfulness, the Court examined

⁶ See *Coston v. Platt Theatres, Inc.*, 860 F.2d 834, 837 (7th Cir. 1988) ("The term 'knew' . . . refers to the fact that the employer knew he was violating the ADEA, not to the fact that he was aware of the Act."); *Costen Dreyer v. Arco Chemical Co.*, 801 F.2d 51, 656 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) (concluding that the *Thurston* standard did not fit individual cases because knowledge that discrimination is unlawful could be inferred from mere posting of ADEA notices in the workplace).

⁷ For example, if an employer terminates an employee based on that employee's age and the employer knows that his decision is prohibited by the ADEA, then that employer willfully violated the law. *Dolgin v. Shearson Lehman Hutton, Inc.*, 714 F. Supp. 369, 370 (N.D. Ill. 1989) ("If [the employee] is able to prove that [the employer] actually believed that terminating [the employee] violated the ADEA, she may recover liquidated damages."); If the employer decides to terminate an older employee based on his age and does not know that his conduct is covered by the ADEA, then the question is whether he acted in "reckless disregard" of the law. The "reckless disregard" prong of the standard is met when an employer "acts without interest or concern for its employees' rights under the ADEA at the time it decides to discharge an employee; that is without making any reasonable effort to determine whether the decision to discharge violates the law." *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989).

whether TWA made an effort to determine whether the age-based policy violated the ADEA. Because TWA had made reasonable and good faith efforts to "bring its retirement policy into compliance with the ADEA," the Court concluded that TWA's actions were not willful. *Id.* at 130. Thus, while TWA's efforts to comply with the law did not prevent first-tier liability, they did prevent second-tier liability.

The Seventh Circuit's analysis in *EEOC v. Century Broadcasting Co.*, 957 F.2d 1446 (7th Cir. 1992), exemplifies a proper application of the *Thurston* willfulness standard in an individual disparate treatment case. In *Century Broadcasting*, the defendant radio station was found to have willfully violated the ADEA when it discharged all of its announcers over the age of 40 and retained a 27-year-old announcer without auditioning any of the older announcers for the station's new format. The court specifically noted that the station had not "introduc[ed] any evidence that [they had] met with the company's attorneys to inquire whether the plan . . . would violate the ADEA." *EEOC v. Century Broadcasting*, 957 F.2d at 1459.

A court's consideration of an employer's inquiry into its legal obligations is only one example of many in which an award of liquidated damages may not automatically follow a finding of intentional discrimination. The exemp-

⁸ It is well-settled that the ADEA does not incorporate the good faith defense of Section 11 of the Fair Labor Standards Act, 29 U.S.C. § 260. *Thurston*, 469 U.S. at 129, n.22. However, "the same concerns [of good faith and reasonableness] are reflected in the proviso to Section 7(b) of the ADEA." *Id.* The relevance of an employer's asserted good faith depends on the particular facts of the case. See *EEOC v. Board of Governors*, 957 F.2d 424, 428 (7th Cir.), petition for cert. filed, 60 U.S.L.W. 3829 (U.S. May 28, 1992) (No. 91-1895); *Price v. Marshall Erdman & Assocs.*, 966 F.2d 320, 323 (7th Cir. 1992); *Kuepferle v. Johnson Controls, Inc.*, 713 F. Supp. 171, 173 (M.D.N.C. 1988) (defendant's attempt to ascertain the legality of his proposed action to discharge the plaintiff by contacting corporate headquarters "tends to rebut any inference of reckless disregard").

tions⁹ and affirmative defenses¹⁰ of the ADEA present a variety of instances¹¹ for distinguishing between intentional discrimination and willful violations.¹²

Through the ADEA's liquidated damages provision, Congress created an incentive for employers to inquire responsibly whether their conduct complies with the ADEA before they make an employment decision. Those employers who make an honest effort to "determine their legal obligation[s]"¹³ under the ADEA will not be subject

⁹ See, e.g., *Hysell v. Mercantile Stores Co.*, 736 F. Supp. 457, 460 (S.D. N.Y. 1989) (No evidence of willfulness where after receiving counsel's letter that plaintiff's position came under the "bona fide executive" exemption to the ADEA, 29 U.S.C. § 631(c) (1988), the company forced the plaintiff to retire). But see *Price v. Marshall Erdman & Assocs.*, 966 F.2d 320 (7th Cir. 1992). The Seventh Circuit's analysis in *Price* exemplifies a proper application of the "reckless disregard" prong of the *Thurston* standard with respect to the employer's obligations under the ADEA. The court explained:

The jury was entitled to find that Erdman's conduct fell on the reckless side of the line. Erdman had so far neglected its responsibilities for compliance with the age discrimination law as to allow a supervisory employee to whom it had delegated the power to hire and fire to remain ignorant of one of the most basic features of the law—namely the age at which workers are protected by it.

Price v. Marshall Erdman & Assocs., 966 F.2d at 324.

¹⁰ See, e.g., *EEOC v. O'Grady*, 857 F.2d 383, 388 (7th Cir. 1988) (mere failure to establish a BFOQ defense does not necessarily mean that the employer's conduct was willful).

¹¹ See, e.g., *Aledo-Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 357 (1st Cir. 1989) (No liquidated damages for discharging 70-year-old on day before effective date of the 1986 amendments to the ADEA since the "application of the amendment was a real question in controversy").

¹² See also examples cited in EEOC Br. at 13-14; National Employment Lawyers Association Br. at 10.

¹³ *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

to liquidated damages. Congress has made it clear, however, that those employers who act knowing their conduct violates the ADEA or who recklessly disregard the ADEA in acting will be subject to liquidated damages.

B. The *Thurston* Standard Properly Applies To Individual Discriminatory Treatment.

The only reason asserted by petitioners for distinguishing *Thurston*'s definition of willfulness under the ADEA is that *Thurston* involved a discriminatory policy and this case involves discrimination against an individual.¹⁴ The question is whether this distinction requires a different and more onerous standard of willfulness to maintain the two-tiered scheme in individual cases. AARP respectfully submits that *Thurston*'s knowing or reckless disregard standard properly implements the ADEA's two-tiered liability scheme regardless of the nature of the employment decision or the number of individuals effected by the employment decision.

The inquiry underlying first-tier liability for disparate treatment does not depend on whether the treatment occurs in the context of a decision to terminate an individual or in a decision to adopt a policy to terminate a group of individuals. The ultimate issue remains the same—did the employer intentionally discriminate? See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) (courts should not lose sight of ultimate issue in a discrimination case.) Indeed, proof of discriminatory intent was a central issue in the “policy”

¹⁴ While petitioners also attempt to distinguish *Thurston* as a disparate impact case, Petitioners' Brief at 38, they are clearly mistaken. Disparate impact cases involve facially neutral policies. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 978 (1988). *Thurston* was a disparate treatment case that challenged a facially discriminatory policy. 469 U.S. at 121. See *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1065 n.4 (7th Cir. 1989).

case of *Thurston*, from which petitioners seek to distance themselves.¹⁵

Similarly, the inquiry for determining liability under the second tier is no different in an individual case than it is in a policy case as discussed above. Indeed, the *Thurston* standard derives from a Second Circuit decision in an individual discriminatory treatment case, namely *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981). The Second Circuit explained in *Thurston*:

As we indicated in *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981), in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.

See *Air Line Pilots Ass'n v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part, rev'd in part, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Since the *Thurston* standard, when properly applied as in this case, maintains the ADEA's two-tiered scheme, there is no compelling reason to adopt a different standard for individual discrimination cases.

C. Creating Different Standards Of Willfulness Under The ADEA Is Contrary To The Language, Structure, And Purposes Of The ADEA.

Petitioners urge the Court to redefine willful in Section 7(b) of the ADEA to require proof of “outrageous

¹⁵ The petition for *certiorari* in *Thurston* stated the question presented on willfulness as follows:

Whether specific intent to discriminate is necessary to establish a “willful” violation under the Age Discrimination in Employment Act, an issue as to which the Courts of Appeals are sharply divided?

Petition for *Certiorari* in *Trans World Airlines, Inc. v. Thurston*, 465 U.S. 1065 (1984) (No. 83-997).

conduct" in individual disparate treatment cases. Petitioners essentially ask the Court to legislate a punitive damages standard¹⁶ into the ADEA's willfulness provision. The imposition of such an onerous punitive damages standard for obtaining liquidated damages should be rejected by this Court because it is contrary to the language, structure, and purposes of the ADEA.

The ADEA uses the terms "liquidated damages" and "willful" in Section 7(b) to provide for an award of double damages. 29 U.S.C. § 626(b). The meaning and use of these terms at the time Congress incorporated them into the ADEA demonstrates that Congress did not intend to impose a punitive damages standard of outrageous conduct in ADEA Section 7(b).

At the time Congress enacted the ADEA, liquidated damages were a "well-known remedy" and were not regarded as "penalties." *Ree Trailer Co. v. United States*, 350 U.S. 148, 150-51 (1956). Rather, the function of liquidated damages was to provide a measure of recovery when damages are uncertain in nature or amount or unmeasurable. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947). Consistent with this accepted understanding of liquidated damages, this Court ruled that the purpose of the FLSA's liquidated damages provision was to make the employee whole, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), not to punish the employer. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).¹⁷

¹⁶ Petitioners argue, with support from the Third Circuit Court of Appeals in *Dreyer v. Arco Chemical Co.*, 801 F.2d 651 (3d Cir. 1986), cert. denied, 480 U.S. 906 (1987), that the outrageousness standard flows from *Thurston's* characterization of the ADEA's liquidated damages as "punitive in nature." *Thurston*, 469 U.S. at 125.

¹⁷ As this Court has often noted, interpretations of the FLSA are relevant in interpreting the ADEA. *Thurston*, 469 U.S. at 126. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). While the FLSA and ADEA's liquidated damages provisions are not identical, the

In *Thurston*, the Court also relied on the accepted meaning of the term "willful" at the time Congress employed it in the ADEA. 469 U.S. at 126-27. The Court's construction of "willful" to mean "knowing or reckless disregard comports with this principle of statutory construction. See *Lorillard v. Pons*, 434 U.S. 575, 583 (1978).

Interpreting "willful" to mean "outrageous" disregards the significant differences between the terms.¹⁸ Outrageousness can be shown by evil motive, malice or bad purpose.¹⁹ As Congress plainly acknowledged in enacting the ADEA, age discrimination typically does not result from malice.²⁰ Thus, this Court declined to adopt a standard for willfulness under the ADEA that required proof of evil motive, malice²¹ or bad purpose. *Thurston*, 469 U.S. at 126 n.19.

addition of the willfulness criterion to the ADEA's liquidated damages provision does not erase its compensatory origin. See *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 6, 7, & nn.8, 9 (1st Cir. 1989).

¹⁸ The application of the terms "willful" and "outrageous" in the punitive damages context demonstrates that the terms are not interchangeable. To justify an award of punitive damages, "the conduct must not only be willful and malicious, but it 'must also be aggravated and outrageous.'" *Miller v. United States*, 945 F.2d 1464, 1467 n.3 (9th Cir. 1991), quoting *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675, 680 (1986). Willfulness may be an element of outrageous conduct, but outrageousness is not a necessary component of willfulness. In other words, conduct may be "willful" but not "outrageous," under the common-law punitive damages standard. *Mariner Water Renaturalizer of Washington, Inc. v. Aqua Purification System*, 665 F.2d 1066, 1071 (D.C. Cir. 1981) (*per curiam*).

¹⁹ Restatement (Second) of Torts § 908(2) 1977.

²⁰ "The discrimination older workers have most to fear . . . is not from any employer malice." U.S. Department of Labor, *The Older American Worker: Age Discrimination in Employment* 3 (1965).

²¹ In contrast, Congress' recent provision of punitive damages in the Civil Rights Act of 1991 illustrates that Congress specifies when

"[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 9 (1911). Given the well-known meaning of the terms "liquidated damages" and "willful" at the time Congress enacted the ADEA, it is clear that Congress did not intend the provision for double damages under ADEA Section 7(b), 29 U.S.C. § 626(b), to function as a punitive damages provision requiring proof of outrageous conduct.

A punitive damages standard is not only contrary to the language of the ADEA, it is contrary to the statutory framework as well. Petitioners argue that an individual victim of discrimination would have to satisfy not only the two tiers identified in *Thurston*, but an additional and more onerous punitive damages standard of outrageous conduct. This would effectively add a third tier of proof in individual cases that is simply inconsistent with the ADEA's structure.

Moreover, petitioners' attempt to recast the ADEA's liquidated damages as punitive damages would defeat the purposes of the liquidated damages provision. Congress sought to combine the deterrent effect of the willfulness component in FLSA § 16(a), 29 U.S.C. § 216(a), with the compensatory purpose embodied in FLSA § 16(b)'s,

it requires proof of malice or is imposing a punitive damages standard. Under the Civil Rights Act of 1991, punitive damages are available where the employer acted with "malice or reckless indifference to the federally protected rights of an aggrieved individual." Pub. L. No. 102-166, § 1981A(b)(1), 105 Stat. 1071 (1991). See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991) ("congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated.")

29 U.S.C. § 216(b), double damages.²² While the ADEA's liquidated damages may "furnish an effective deterrent to willful violations," 113 Cong. Rec. 2199 (1967) (Statement of Sen. Javits), they also compensate the victim of discrimination for nonpecuniary losses. See H.R. Conf. Rep. 950, 95th Cong., 2d Sess. 13-14 (1978).²³

Finally, the outrageous conduct standard is wholly inappropriate for the ADEA because it would not deter the very discrimination that Congress found to be so serious and prevalent:

What we have learned, essentially, is that a great deal of the problem stems from pure ignorance; there is simply the widespread irrational belief that once men and women are past a certain age they are no longer capable.

113 Cong. Rec. 31256 (1967) (Statement of Sen. Young). By enacting the ADEA, Congress declared that such

²² Liquidated damages may have a deterrent effect without becoming punitive damages. *Priebe & Sons, Inc. v. United States*, 332 U.S. at 411. Punitive damages serve many functions and purposes in addition to deterrence. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring, in part, and dissenting in part) (citing numerous Supreme Court cases recognizing the penal nature of punitive damages).

²³ Congress recognized the compensatory function of the ADEA's liquidated damages provision in providing jury trials for such claims:

Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).

H.R. Conf. Rep. 950, 95th Cong., 2d Sess. 14 (1978).

ignorance and ageist stereotypes would no longer be tolerated. The 'knowing or reckless disregard' standard fulfills Congress' commitment to eliminate age discrimination from the workplace.²⁴

II. AN EMPLOYER'S INTERFERENCE WITH AN EMPLOYEE'S PENSION BENEFITS MAY BE EVIDENCE OF AGE DISCRIMINATION.

AARP concurs with the position of respondent and the EEOC that the issue concerning pension vesting as stated in the Petition for a Writ of *Certiorari* is not presented by the record or the lower court decisions in this case.²⁵ In their brief on the merits, petitioners present an entirely new issue attacking the overall finding of ADEA liability, which they claim is based on pension vesting, and not on age.²⁶

Should the Court review an issue concerning the evidence of pension vesting in this case, AARP submits that

²⁴ For these reasons, AARP disagrees with the proposition raised by the dissent in *EEOC v. Century Broadcasting Co.*, 957 F.2d 1446 (7th Cir. 1992), that "unconsciously motivated [age discrimination] provides a basis for distinguishing between willful and non-willful discrimination in disparate treatment cases." 957 F.2d at 1466. (Manion, J., dissenting). Employers who act based on unfounded assumptions and stereotypes about older workers recklessly disregard the clear commands of the ADEA, whether their motivation is conscious or unconscious.

²⁵ Respondent's Brief at 32-36; EEOC's Brief at 21-22.

²⁶ Again, this question is not appropriate for review since it was neither presented nor preserved in the petition for *certiorari*. It is the long-established jurisprudence of this Court that consideration of a case will be limited to those questions specifically raised in the petition for a writ of *certiorari*, to the exclusion of other questions involved in the assertions of error in the supporting briefs. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938); *Rorick v. Devon Spadicate*, 307 U.S. 299 (1939). Further, the Court has expressed its disapproval of the practice of smuggling additional questions into a case after the granting of *certiorari*, stating that "[t]he issues here are fixed by the petition" *Irvine v. California*, 347 U.S. 128, 129 (1954).

the legal principle in question is whether such evidence may be relevant proof of age discrimination. Every circuit to address the issue has answered yes to that question. See *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1421 (9th Cir. 1992); *Benjamin v. United Merchants and Mfrs. Inc.*, 873 F.2d 41, 43 (2d Cir. 1989); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1466 (5th Cir.), *cert. denied*, 493 U.S. 843 (1989); *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (3d Cir. 1988).

Despite the weight of authority against their position, petitioners contend that pension status has no relevance to a claim of age discrimination. Surely, the fact that petitioners terminated Mr. Biggins knowing he would lose his right to a pension is relevant to assessing their treatment of him. In this case, depriving Mr. Biggins of pension benefits was a potent threat because petitioners knew that Mr. Biggins' age made these benefits particularly valuable to him.

The relevant of evidence of an employer's interference with pension vesting or benefits will vary as much as the facts of age discrimination vary from case-to-case. Whether such evidence may support a claim of age discrimination is for the finder of fact to decide.²⁷ Based on all of the evidence in this case, including the evidence related to pension vesting, the jury, as affirmed by the district court and court of appeals, concluded that petitioners discriminated against Mr. Biggins. That finding should not be disturbed.

²⁷ It is not the role of the appellate court to second-guess the determination of the jury. *EEOC v. Century Broadcasting Co.*, 957 F.2d at 1457.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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